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**The Link Between Reckless Credit and
Emolument Attachment Orders**

By

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Statement of Originality

I, Nishtha Singh, hereby declare that this dissertation is an original piece of work, unless indicated otherwise in the text. This dissertation is made available for photocopying and inter-library loan.



Nishtha Singh

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Table of Contents

<u>Abstract</u>	8
<u>Chapter 1</u> Introduction	
1.1 Background	9
1.1.1 Overview of the South African Credit Market	10
1.1.2 The National Credit Act	12
1.1.3 Amendment to the National Credit Act	12
1.1.4 Emolument Attachment Orders	14
1.1.5 <i>Stellenbosch Law Clinic</i> Litigation	16
1.1.6 The Link Between Reckless Credit and Emolument Attachment Orders	17
1.2 Statement of Purpose and Rationale for the Study	18
1.3 Research Questions	19
1.4 Overview of Chapters	19
1.5 Research Methodology	20
<u>Chapter 2</u> Reckless Credit in South Africa	
2.1 Introduction	21
2.2 Reckless Credit Under the National Credit Act	
2.2.1 Introduction	24
2.2.2 Instances of Reckless Credit	24
2.2.3 The Defence of Reckless Credit	28
2.2.4 Analysis of Applicable Case Law	30
2.2.5 Conclusion	33
2.3 The Affordability Assessment Guidelines and Amendment to the National Credit Act	
2.3.1 Introduction	33
2.3.2 Drafting and Interpretational Difficulties with the National Credit Act	34
2.3.3 Lack of Conformity with Pre-Agreement Assessments	35
2.3.4 National Treasury and BASA Concerned About the Reckless Lending Practices	37
2.3.5 The Link Between Reckless Credit and Emolument Attachment Orders	38

2.3.6	Initial Affordability Assessment Guidelines	39
2.3.7	Amendments to the National Credit Act	41
2.3.8	Effectiveness of the National Credit Act Amendment	43
2.3.9	Conclusion	44
2.4	The Inclusion of External Market Factors in the National Credit Act	
2.4.1	Introduction	44
2.4.2	South Africa's Volatile Economy	45
2.4.3	The Inclusion of External Market Factors into Pre-Agreement Assessments	46
2.4.4	Implementation of External Market Factors into Pre-Agreement Assessments	48
2.4.5	Conclusion	49
2.5	Conclusion	50
<u>Chapter 3</u>	Does A Link Exist Between Reckless Credit and Emolument Attachment Orders?	
3.1	Introduction	51
3.2	The Role of Reckless Lending	
3.2.1	Introduction	54
3.2.2	Financial Ignorance	54
3.2.3	The Impact of Reckless Lending on Emolument Attachment Orders	55
3.2.4	The Tick Box Approach	56
3.2.5	The University of Pretoria's Research into Reckless Lending and Emolument Attachment Orders	58
3.2.6	Case Law Identifying the Link Between Reckless Lending and Emolument Attachment Orders	59
3.2.7	Conclusion	60
3.3.	Default and Section 129 Notice	
3.3.1	Introduction	60
3.3.2	Mandatory Section 129 Notice	60

3.3.3	The Issue of Sufficient Information in a Section 129 Notice	61
3.3.4	Plain Language	66
3.3.5	Conclusion	67
3.4	Debt Collection Process and Emolument Attachment Orders	
3.4.1	Introduction	67
3.4.2	Procedure to Obtain an Emolument Attachment Order	67
3.4.3	Issues Surrounding Emolument Attachment Orders	68
3.4.4	The Absence of Judicial Oversight in the Emolument Attachment Order Process	72
3.4.5	Remedy to the Issues Surrounding Emolument Attachment Orders	73
3.4.6	The Status of Future Emolument Attachment Orders	75
3.4.7	Conclusion	76
3.5	Conclusion	77
<u>Chapter 4</u> The Current Regulation of Emolument Attachment Orders		
4.1	Introduction	78
4.2	<i>University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others</i> (16703/14) [2015] ZAWCHC 99; 2015 (5) SA 221 (WCC); [2015] 3 All SA 644 (WCC); (2015) 36 ILJ 2558 (WCC) (8 July 2015)	
4.2.1	Introduction – Context on EAOs	81
4.2.2	Judgement by Desai J	82
4.2.3	Conclusion	85
4.3	<i>University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others; Association of Debt Recovery Agents NPC v University of Stellenbosch Legal Aid Clinic and Others; Mavava Trading 279 (Pty) Ltd and Others v University of Stellenbosch Legal Aid Clinic and Others</i> (CCT127/15) [2016] ZACC 32; 2016 (6) SA 596 (CC); (2016) 37 ILJ 2730 (CC); 2016 (12) BCLR 1535 (CC) (13 September 2016)	
4.3.1	Introduction	87
4.3.2	The Minority Judgement by Jafta J (Para 1 to 127)	87
4.3.3	Cameron J's Majority Judgement (Para 128 to 161)	89

4.3.4	Zondo J's Majority Judgement (Para 162 to 213)	92
4.3.5	Effect of the Order	96
4.3.6	Conclusion	97
4.4	Amendment to the Magistrates Court Act	
4.4.1	Introduction	97
4.4.2	Amendments to the Law	98
4.4.3	Commentary on the Amendments	101
4.4.4	Foreign Comparative Analysis	102
4.4.4.1	German Law	103
4.4.4.2	Botswana Law	105
4.4.4.3	United Kingdom (England and Wales)	106
4.4.5	Conclusion	108
4.5	Conclusion	109
<u>Chapter 5</u> Conclusion and Recommendations		
5.1	Conclusion	110
5.2	Recommendations	
5.2.1	The Inclusion of External Market Factors in the National Credit Act	113
5.2.2	Further Education and Awareness for Consumers	114
5.2.3	Further Training for Magistrates and Court Clerks	115
5.2.4	Amendment to the Magistrates Court Act Regarding the 25% Statutory Cape – Adopting the German Law Approach	116
<u>Bibliography</u>		
1	Primary Sources	
1.1	Case Law	118
1.2	Statutes	120
1.3	International Law	120
1.4	Foreign Law	120
2	Secondary Sources	
2.1	Books	121
2.2	Journal Articles	121
2.3	Research Reports	125
2.4	Online Sources	126

Abstract

South Africa has experienced significant levels of reckless credit thus leading to over-indebtedness of consumers. Furthermore, research conducted in 2008 and 2013 by the University of Pretoria indicated that there were abuses prevalent in emolument attachment orders (EAOs). An interesting aspect of the research was that credit providers were particularly interested in employed consumers, as their wages or salaries were deemed to be a form of security. The aim of this dissertation is to examine the link between reckless credit and EAOs. The main research problem revolves around the fact that credit providers do not conduct thorough pre-agreement assessments and have a tendency to subscribe to the tick box approach to compliance. Moreover, these pre-agreement assessments do not make provision for the inclusion of external market factors, which is essential to safeguard consumers against economic events. This dissertation argues that, at the point when reckless credit is granted, it is inevitable that default will occur thus leading to the culmination of an EAO. In this regard, the case of *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others; Association of Debt Recovery Agents NPC v University of Stellenbosch Legal Aid Clinic and Others; Mavava Trading 279 (Pty) Ltd and Others v University of Stellenbosch Legal Aid Clinic and Others* (CCT127/15) [2016] ZACC 32 is important. The judgement illustrates how vulnerable consumers fell prey to unscrupulous credit providers who then took advantage of their salaries. An important aspect about the judgement was that section 65J of the Magistrates Court Act has now been amended through a joint interpretative mechanism of severance and reading in. The Constitutional Court's order now requires judicial supervision in the EAO process, whereby a magistrate issues the EAO. This dissertation examines the effect of this and how EAOs are currently regulated. It also discusses whether judicial supervision is the solution to ameliorating the law on EAOs. Qualitative research methods were utilised such as legislation, case law, textbooks and journal articles. While there are no statistics to prove the link, anecdotal evidence proves the link between reckless credit and EAOs.

Chapter 1 - Introduction

1.1 Background

Since the promulgation of the National Credit Act,¹ in theory, consumers have access to safe and reliable credit.² By virtue of Apartheid in South Africa, and the discriminatory laws attached to the regime, credit was not easily accessible to the majority. During this period, the white minority were in a stronger position as this specific group had greater access to commercial credit.³ The need for the NCA arose from the lack of protection afforded to consumers previously and the lack of regulation in the consumer credit market.⁴

In examining the consumer credit market in South Africa, reckless lending is a crucial problem which leads to the over-indebtedness of consumers and ultimately leaves consumers with little to no income.⁵ In South African law, the NCA sought to safeguard consumers against reckless lending, however, the past inequalities contributed to the rise in reckless lending.⁶ In addition to the problems surrounding the granting of reckless credit, in recent times, the abuses surrounding emolument attachment orders⁷ became prevalent and one of the reasons for such abuse identified by the Law Society of South Africa⁸ was reckless lending.⁹

¹ Hereafter referred to as the NCA. Act 34 of 2005.

² JM Otto *The National Credit Act Explained* 3 ed (2013) 2.

³ *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others; Association of Debt Recovery Agents NPC v University of Stellenbosch Legal Aid Clinic and Others; Mavava Trading 279 (Pty) Ltd and Others v University of Stellenbosch Legal Aid Clinic and Others* (CCT127/15) [2016] ZACC 32 at para 7.

⁴ S Renke, M Roestoff & F Haupt "The National Credit Act: New Parameters for the Granting of Credit in South Africa" (2007) 28 *Obiter* 230.

⁵ JW Scholtz...et al *Guide to the National Credit Act* (2008) 11.5. M Kelly-Louw "The Prevention and Alleviation of Consumer Over-Indebtedness" (2008) 20 (2) *SA Mercantile Law Journal* 204.

⁶ M Kelly-Louw "The Prevention and Alleviation of Consumer Over-Indebtedness" (2008) 20 (2) *SA Mercantile Law Journal* 204. As the majority was excluded from accessing credit during Apartheid, the legislature envisaged the inclusion of all South Africans in accessing credit. It is submitted that South Africa's discriminatory past contributed to reckless credit as the credit market became more accessible and credit providers sought to circumvent the NCA in granting credit.

⁷ Hereafter referred to as EAOs. Section 61 of the Magistrates Court Act 32 of 1944 (hereafter referred to as the MCA) defines an EAO as: "An EAO includes a salary, wage, any form of remuneration and any allowances, whether expressed in money or not."

⁸ Hereafter referred to as LSSA.

⁹ B Whittle "LSSA condemns unscrupulous garnishee practices" (2013) *De Rebus* 13. In 2013, the University of Pretoria conducted a follow up research surrounding EAOs and found that consumers who had a history of defaulting and evidently could not afford new credit agreements were granted new credit facilities. The report found that credit providers were particularly interested in consumers who were employed and had a salary, which could then be attached through an EAO. The report suggests that an EAO is a form of security for credit providers who provided unsecured credit to consumers.

There appears to be a link in existence between reckless lending by credit providers and the abuse of EAO's.¹⁰ The primary aim of this research is to examine whether a link exists between reckless credit and EAOs, as identified by LSSA,¹¹ case law¹² and research reports.¹³ If such a link does indeed exist, this research will propose suggestions for amendment.

1.1.1 Overview of the South African Credit Market

The historical timeline of consumer related legislation around the globe reveals that South Africa, in enacting the NCA introduced over-indebtedness and reckless credit into South African law as new concepts.¹⁴ The reason for bringing the concept of reckless credit into South African law was due to the fact that previous legislation did not provide sufficient protection for consumers.¹⁵ While past inequalities rendered the majority unable to access credit, in introducing reckless credit, the legislature envisaged protecting consumers from the vicious trap of reckless credit.¹⁶ This is consistent with the South African legislature's intention over the past fifteen years with other consumer centric legislation being promulgated with the primary aim of protecting and assisting consumers, such as: the Consumer Protection Act 68 of 2008 and the Protection of Personal Information Act 4 of 2013.

Furthermore, the report found that some consumers had more than one EAO issued against their salary, indicating reckless credit as insufficient pre-agreement assessments were conducted.

"The incidence of and undesirable practices relating to "garnishee orders" – a follow up report" *The University of Pretoria* available at <http://archivedpublicwebsite.up.ac.za/sitefiles/file/47/327/2013%20garnishee%20orders%20follow%20up%20report.pdf>, accessed on 1 March 2017. *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice And Correctional Services and Others* (16703/14) [2015] ZAWCHC 99; 2015 (5) SA 221 (WCC); [2015] 3 All SA 644 (WCC); (2015) 36 ILJ 2558 (WCC) (8 July 2015) at para 38.

¹⁰ B Whittle "LSSA condemns unscrupulous garnishee practices" (2013) *De Rebus* 13. *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice And Correctional Services and Others* (16703/14) [2015] ZAWCHC 99; 2015 (5) SA 221 (WCC); [2015] 3 All SA 644 (WCC); (2015) 36 ILJ 2558 (WCC) (8 July 2015). "The incidence of and undesirable practices relating to "garnishee orders" – a follow up report" *The University of Pretoria* available at <http://archivedpublicwebsite.up.ac.za/sitefiles/file/47/327/2013%20garnishee%20orders%20follow%20up%20report.pdf>, accessed on 1 March 2017.

¹¹ B Whittle "LSSA condemns unscrupulous garnishee practices" (2013) *De Rebus* 13.

¹² *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice And Correctional Services and Others* (16703/14) [2015] ZAWCHC 99; 2015 (5) SA 221 (WCC); [2015] 3 All SA 644 (WCC); (2015) 36 ILJ 2558 (WCC) (8 July 2015).

¹³ "The incidence of and undesirable practices relating to "garnishee orders" – a follow up report" *The University of Pretoria* available at <http://archivedpublicwebsite.up.ac.za/sitefiles/file/47/327/2013%20garnishee%20orders%20follow%20up%20report.pdf>, accessed on 1 March 2017.

¹⁴ J Otto "The History of Consumer Credit Legislation in South Africa" (2010) 16 (1) *Fundamina* 272.

¹⁵ JW Scholtz...et al *Guide to the National Credit Act* (2008) 11.5.

¹⁶ JW Scholtz...et al *Guide to the National Credit Act* (2008) 11.5.

South Africa has an active credit market, with many consumers relying on credit to access goods and services.¹⁷ In a recent financial study,¹⁸ it was found that in the context of the financial industry and wealth inequality, financial ignorance is an impediment and disadvantageous factor to consumers in conducting their financial affairs effectively. The NCR's 2015 Annual Report¹⁹ statistics reveal that as at March 2016, 143 620 consumers had applied for debt review²⁰ while 449 467 consumers were under debt review.²¹ The NCR noted a concern that credit providers were not forthcoming in supplying documentation which is crucial to determine whether the consumer was a victim of reckless credit.²²

The position between credit providers and consumers is inherently unequal as the former exercises a significant amount of power, to the detriment of the consumers.²³ Credit is a fundamental part of society, however, a problem arises when the practice

¹⁷ The National Credit Regulator (hereafter referred to as the NCR) released its Consumer Credit Market Report for the second quarter of the year 2016. The NCR revealed that for the second quarter of 2016, the debt reflected in the debtors' book was R1.66 trillion for the consumer credit market; this was a 0.31% increase from the previous quarter of the year. As at June 2016, the amount of new credit granted to consumers was R108.32 billion. Upon an examination of unsecured credit in South Africa, the NCR found that it decreased for the second quarter, however, it increased by R49.37 million year on year. On the other hand, secured credit increased by 1.1% for the second quarter; on a year on year analysis, secured credit grew by R17.52 billion. "Consumer Credit Market Report" *The National Credit Regulator* available at <https://www.ncr.org.za/documents/CCMR/CCMR%20June%202016.pdf>, accessed on 28 February 2017.

¹⁸ J Campbell "Restoring Rational Choice: The Challenge of Consumer Financial Regulation" (2016) *Sloan Foundation Economic Research Paper* No. 2719330 17.

¹⁹ 23.5% consumers had impaired credit records while 17.7% of consumers were in arrears of more than three months, according to the 2015 Annual Report.

²⁰ A consumer can apply for debt review in terms of section 86 of the NCA. Section 86 (1) provides that a consumer can apply to a debt counsellor to have himself/herself declared over-indebted. Debt review allows for either the credit agreement to be declared as reckless or the consumers' financial obligations to be rearranged in a manner to prevent over-indebtedness.

²¹ "The National Credit Regulator Annual Report 2015/2016" *The National Credit Regulator* available at <https://www.ncr.org.za/documents/pages/Annual%20Reports/NCR%20Annual%20Report%202015-16.pdf>, accessed on 28 February 2017.

²² "The National Credit Regulator Annual Report 2015/2016" *The National Credit Regulator* available at <https://www.ncr.org.za/documents/pages/Annual%20Reports/NCR%20Annual%20Report%202015-16.pdf>, accessed: 28 February 2017 at 31.

²³ An appropriate description of the unequal position between consumers and credit providers in South Africa has been described aptly by Yacoob J in *AAA Investments (Proprietary) Limited v Micro Finance Regulatory Council and Another* (CCT51/05) [2006] ZACC 9; 2006 (11) BCLR 1255 (CC); 2007 (1) SA 343 (CC) (28 July 2006) at para 5: "It is universally accepted that money lending transactions are susceptible to abuse mainly because borrowers are usually in a much weaker position than lenders. Moneylenders can therefore easily exploit this vulnerability of the borrower, and some have been guilty of serious impropriety so frequently as to give rise to considerable concern. Moneylending transactions are therefore legitimately subject to legislative control in most parts of the world."

of reckless lending becomes prevalent and consumers find themselves part of a debt trap.²⁴ This trap is exacerbated by the apparent abuse in the EAO process.²⁵

1.1.2 The National Credit Act

Section 81 of the NCA requires that a credit provider conduct an extensive assessment of the consumer before granting credit. Section 80 (1) of the NCA lists situations when a credit agreement is reckless.²⁶ The crucial aspect of determining reckless credit is the pre-agreement assessment²⁷ which credit providers are required to conduct.²⁸ The requirement is onerous but critically necessary in terms of section 81 (2) of the NCA, as was held in *National Credit Regulator v Hirst*.²⁹

1.1.3 Amendment to the National Credit Act

Initially, credit providers were permitted to determine their own mechanisms to conduct such assessment as per section 82 of the NCA.³⁰ Considering the significant prevalence of reckless lending and consumers' over-indebtedness, the Affordability

²⁴ J Campbell "The Excessive Cost of Credit on Small Money Loans under the National Credit Act 34 of 2005" (2007) 19 (3) *SA Mercantile Law Journal* 253.

²⁵ B Whittle "LSSA condemns unscrupulous garnishee practices" (2013) *De Rebus* 13.

²⁶ (a) the credit provider failed to conduct an assessment as required by section 81(2), irrespective of what the outcome of such an assessment might have been at the time; or

(b) the credit provider, having conducted an assessment as required by section 81(2), entered into the credit agreement with the consumer despite the fact that the preponderance of information available to the credit provider indicated that

(i) the consumer did not generally understand or appreciate his risks, costs or obligations under the proposed credit agreement; or

(ii) entering into that credit agreement would make the consumer over-indebted.

²⁷ Section 81 (2) of the NCA: A credit provider must not enter into a credit agreement without first taking reasonable steps to assess –

(a) the proposed consumer's –

(i) general understanding and appreciation of the risks and costs of the proposed credit, and of the rights and obligations of a consumer under a credit agreement;

(ii) debt re-payment history as a consumer under credit agreements;

(iii) existing financial means, prospects and obligations; and

(b) whether there is a reasonable basis to conclude that any commercial purpose may prove to be successful, if the consumer has such a purpose for applying for that credit agreement

²⁸ Scholtz (note 5 above;11.5.3).

²⁹ [2015] ZANCT 18 (29 October 2015).

³⁰ Through an examination of the case law, the courts provided guidance in each circumstance as to whether a credit provider conducted a sufficient pre-agreement assessment. In *Horwood v First Rand Bank Ltd* [2011] ZAGPJHC 121 (21 September 2011), it was held that it is an objective determination, combined with the facts and circumstances of the case which would ultimately determine whether a pre-agreement assessment was conducted.

Assessment Guidelines³¹ were published³² by the Department of Trade and Industry. The Affordability Assessment Guidelines seeks to set minimum standards for evaluating consumer credit, to curtail reckless lending.

They were introduced because credit providers were given unlimited freedom in developing their own assessment mechanisms and no set method existed within the credit industry.³³ Moreover, National Treasury and the Banking Association of South Africa (BASA) released a joint statement in 2012 identifying unscrupulous lending practices in the credit market (evidenced by statistics), which were ultimately compromising the financial position of consumers.³⁴ The various stakeholders agreed to review the lending practices to ensure it does not contribute further to reckless lending.³⁵ In assessing the prevalence of reckless credit and debt, BASA, the NCR and National Treasury were in agreement that one standard to assess affordability of consumers' required development.³⁶

Consequently, following the joint statement by National Treasury and BASA, the National Credit Amendment Act 19 of 2014 includes amendments consistent with the Affordability Assessment Guidelines. This seeks to ameliorate the previous position by creating minimum standards. This amendment provides that a credit provider may still develop its own evaluative mechanisms, however, these mechanisms must be in line with the Affordability Assessment Guidelines.³⁷ This amendment has significantly

³¹ GN 10382 of GG 38557, 13/03/2015.

³² M Kelly-Louw "The 2014 credit information amnesty regulations: what do they really entail?" (2015) 48 (1) *De Jure* 95.

³³ JW Scholtz...et al *Guide to the National Credit Act* (2008) 11.5.6.

³⁴ "Ensuring responsible market conduct for bank lending" *Insurance Times and Investment News* available at <http://views.itinews.co.za/Views/ViewArticle.aspx?Article=7EE1B5F8-9681-4945-80B1-0A1D8C0372C2&CID=21806&Company=National%20Treasury%20-%20Ministry%20of%20Finance#sthash.hKYm8Xzt>, accessed on 17 March 2017.

³⁵ "Ensuring responsible market conduct for bank lending" *Insurance Times and Investment News* available at <http://views.itinews.co.za/Views/ViewArticle.aspx?Article=7EE1B5F8-9681-4945-80B1-0A1D8C0372C2&CID=21806&Company=National%20Treasury%20-%20Ministry%20of%20Finance#sthash.hKYm8Xzt>, accessed on 17 March 2017.

³⁶ "Ensuring responsible market conduct for bank lending" *Insurance Times and Investment News* available at <http://views.itinews.co.za/Views/ViewArticle.aspx?Article=7EE1B5F8-9681-4945-80B1-0A1D8C0372C2&CID=21806&Company=National%20Treasury%20-%20Ministry%20of%20Finance#sthash.hKYm8Xzt>, accessed on 17 March 2017.

³⁷ Section 82 (1) and (2) of the NCA.

changed the previous position under the NCA where credit providers were given freedom³⁸ to develop their own evaluative mechanisms.³⁹

1.1.4 Emolument Attachment Orders

An EAO is a popular debt collection mechanism.⁴⁰ It is a court order utilised to execute against a civil judgement and it obliges the employer of a judgment debtor to pay to the judgement creditor a portion of the judgement debtor's wage/salary.⁴¹ The portion attached will then be paid to the judgement creditor until the debt is satisfied.⁴² The wording of section 65J of the MCA allows credit providers to merely obtain the debtor's consent or authorisation of the court.⁴³ The popular process was to obtain the debtor's consent and approach the clerk of court to give effect to the EAO.

In 2008, the University of Pretoria conducted research into EAOs and its prevalence in South Africa.⁴⁴ In the public sector, a total of 216 857 employees had EAOs issued against their salaries.⁴⁵ In conducting their study, the research team identified that EAOs were plagued with abuses. The research revealed that consumers had significant portions of their salaries attached, some consumers had more than one EAO issued against their salaries.⁴⁶ As court officials were responsible for the issuing

³⁸ "Credit sales slump: The new normal for fashion retailers" *Moneyweb* available at <https://www.moneyweb.co.za/news/companies-and-deals/credit-sales-slump-the-new-normal-for-fashion-retailers/>, accessed on 18 March 2017). Moneyweb investigated major fashion retailers who sell a significant amount of clothing on credit to customers, after the Affordability Assessment guidelines came into effect. Foshini noted a 30% decrease relating to new store cards. On the other hand, Truworths noted a decrease from 30% to 24% in new store cards and estimated a R200 – 250 million estimate in loss of credit sales.

³⁹ JW Scholtz...et al *Guide to the National Credit Act* (2008) 11.5.6 (e).

⁴⁰ "The incidence of and undesirable practices relating to "garnishee orders" – a follow up report" *University of Pretoria* available at <http://archivedpublicwebsite.up.ac.za/sitefiles/file/47/327/2013%20garnishee%20orders%20follow%20up%20report.pdf>, accessed on 18 March 2017 at 56.

⁴¹ Section 65J (1) (b) (i) of the MCA.

⁴² Section 65J (1) (b) (ii) of the MCA.

⁴³ Section 65J (2) (a) of the MCA.

⁴⁴ "The incidence of and the undesirable practices relating to garnishee orders in South Africa" *The National Credit Regulator* available at <https://www.ncr.org.za/documents/pages/research-reports/oct08/GARNISHEE-ORDERS-STUDY-REPORT.pdf>, accessed on 18 March 2017.

⁴⁵ "The incidence of and the undesirable practices relating to garnishee orders in South Africa" *The National Credit Regulator* available at <https://www.ncr.org.za/documents/pages/research-reports/oct08/GARNISHEE-ORDERS-STUDY-REPORT.pdf>, accessed on 18 March 2017 at 97.

⁴⁶ "The incidence of and the undesirable practices relating to garnishee orders in South Africa" *The National Credit Regulator* available at <https://www.ncr.org.za/documents/pages/research-reports/oct08/GARNISHEE-ORDERS-STUDY-REPORT.pdf>, accessed on 18 March 2017 at 13.

of EAOs, it was found that these officials did not understand the matter before them, which led to an unjust determination.⁴⁷ In the context of employers, it was found that they did not necessarily understand how to verify EAOs.⁴⁸ Employers also admitted that such deductions were excessive and deprived an employee of the full benefit of his/her salary.⁴⁹

The University of Pretoria conducted follow up research in 2013 to determine how many employees in South Africa had EAOs issued against their salaries.⁵⁰ As at June 2013, 435 084 employees in the private sector had EAOs issued against their salaries.⁵¹ This research indicates that this is a popular debt collection mechanism to enforce a civil judgment. The call for the inclusion of judicial oversight arose in the EAO process as a lack of supervision on court officials having a wide discretion to grant such orders lead to disastrous outcomes.⁵² The skills of such officials still remained questionable and it remained controversial as to whether such officials understood the nature and severity of the matter before them.⁵³ Both research reports recommended that a magistrate be the one to make the final determination as to whether an EAO be issued.

The aspect of EAOs is relevant as it appears there is a link between reckless credit and EAOs, thus the research will examine whether such link is in existence.

⁴⁷ "The incidence of and the undesirable practices relating to garnishee orders in South Africa" *The National Credit Regulator* available at <https://www.ncr.org.za/documents/pages/research-reports/oct08/GARNISHEE-ORDERS-STUDY-REPORT.pdf>, accessed on 18 March 2017 at 106.

⁴⁸ "The incidence of and the undesirable practices relating to garnishee orders in South Africa" *The National Credit Regulator* available at <https://www.ncr.org.za/documents/pages/research-reports/oct08/GARNISHEE-ORDERS-STUDY-REPORT.pdf>, accessed on 18 March 2017 at 119.

⁴⁹ "The incidence of and the undesirable practices relating to garnishee orders in South Africa" *The National Credit Regulator* available at <https://www.ncr.org.za/documents/pages/research-reports/oct08/GARNISHEE-ORDERS-STUDY-REPORT.pdf>, accessed on 18 March 2017 at 119.

⁵⁰ "The incidence of and undesirable practices relating to "garnishee orders"- a follow up report" *The University of Pretoria* available at <http://archivedpublicwebsite.up.ac.za/sitefiles/file/47/327/2013%20garnishee%20orders%20follow%20up%20report.pdf>, accessed on 1 March 2017.

⁵¹ "The incidence of and undesirable practices relating to "garnishee orders" – a follow up report" *The University of Pretoria* available at <http://archivedpublicwebsite.up.ac.za/sitefiles/file/47/327/2013%20garnishee%20orders%20follow%20up%20report.pdf>, accessed on 1 March 2017 at 78.

⁵² B Young "The Legality of Emolument Attachment Orders" (2013) 14 (2) *IMFO: Official Journal of the Institute of Municipal Finance Officers* 21.

⁵³ B Young "The Legality of Emolument Attachment Orders" (2013) 14 (2) *IMFO: Official Journal of the Institute of Municipal Finance Officers* 21.

1.1.5 Stellenbosch Law Clinic Litigation

The turning point for EAOs came in the form of litigation instituted by the University of Stellenbosch Legal Aid Clinic and other stakeholders. This High Court and Constitutional Court litigation, is important to the research as it serves as a foundation for the changes which have occurred to the law on EAOs. The crucial aspect surrounding the litigation for this research is the inclusion of mandatory judicial oversight, which seemingly can ameliorate the abuses prevalent in the EAO system.

On 8 July 2015, Desai J⁵⁴ declared the relevant sections of section 65J of the MCA unconstitutional for failing to provide judicial oversight.⁵⁵ Thereafter, on 13 September 2016, the Constitutional Court⁵⁶ delivered its judgement where it did not confirm the High Court's order for constitutional invalidity. Instead, in its order, the Constitutional Court through a joint interpretive mechanism of reading in and severance⁵⁷ ordered the inclusion of mandatory judicial oversight in the granting of EAOs.⁵⁸ The judgement

⁵⁴ *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice And Correctional Services and Others* (16703/14) [2015] ZAWCHC 99; 2015 (5) SA 221 (WCC); [2015] 3 All SA 644 (WCC); (2015) 36 ILJ 2558 (WCC) (8 July 2015).

⁵⁵ Para 94: "2. It is declared that:

2.1 the words "the judgment debtor has consented thereto in writing" in section 65J(2)(a) of the Magistrates' Act 32 of 1944 ("the Magistrates' Court Act") and;

2.2 section 65J(2)(b)(i) and section 65J(2)(b)(ii) of the Magistrates' Court Act, are inconsistent with the Constitution of the Republic of South Africa Act, 1996 ("the Constitution") and invalid to the extent that they fail to provide for judicial oversight over the issuing of an emolument attachment order against a judgment debtor."

⁵⁶ *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others; Association of Debt Recovery Agents NPC v University of Stellenbosch Legal Aid Clinic and Others; Mavava Trading 279 (Pty) Ltd and Others v University of Stellenbosch Legal Aid Clinic and Others* (CCT127/15) [2016] ZACC 32.

⁵⁷ *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others; Association of Debt Recovery Agents NPC v University of Stellenbosch Legal Aid Clinic and Others; Mavava Trading 279 (Pty) Ltd and Others v University of Stellenbosch Legal Aid Clinic and Others* (CCT127/15) [2016] ZACC 32 at para 209.

⁵⁸ Para 212: "8. It is declared that section 65J(2)(a) and (b) of the Magistrates' Courts Act, 1944 reads as follows:

"65J. Emoluments attachment orders

...

(2) An emoluments attachment order shall not be issued—

(a) unless the judgment debtor has consented thereto in writing ~~or~~ and the court has so authorised after satisfying itself that it is just and equitable that an emoluments attachment order be issued and that the amount is appropriate, whether on application to the court or otherwise, and such authorisation has not been suspended; or

(b) unless the judgment creditor or his or her attorney has first—

(i) sent a registered letter to the judgment debtor at his or her last known address advising him or her of the amount of the judgment debt and costs as yet unpaid and warning him or her that an emoluments attachment order ~~will~~ may be issued if the said amount is not paid within ten days of the date on which that registered letter was posted; and

(ii) filed with the clerk of the court an affidavit or an affirmation by the judgment creditor or a certificate by his or her attorney setting forth the amount of the judgment debt at the date of the

was hailed as a victory for the poor and for all those consumers who suffered prejudice.⁵⁹ The nature of the order is prospective⁶⁰ and to operate with effect from the handing down of the judgement. In effect, this means that the debtor's consent would have to be obtained as well as the approval of a magistrate.⁶¹

1.1.6 The Link Between Reckless Credit and Emolument Attachment Orders

Since South Africa has an active credit market, it is submitted that while credit is fundamental, it is required to be exercised in a responsible manner. In the event of an allegation of reckless lending, unless a consumer raises a defence of reckless credit,⁶² the credit provider will proceed to execute against the debtor in the event of default. Upon default by the consumer on a credit agreement and once judgement⁶³ has been obtained, amongst the other enforcement mechanisms, an EAO may be issued against the debtor's salary. It is submitted that when reckless credit is granted, and default occurs, an effective and popular means of debt collection exists in the form of an EAO.⁶⁴ Consequently, on the face of it, there certainly appears to be a link between reckless credit and EAOs.⁶⁵

order laying down the specific instalments, the costs, if any, which have accumulated since that date, the payments received since that date and the balance owing and declaring that the provisions of subparagraph (i) have been complied with on the date specified therein; and (iii) been granted an order of court authorising that an emoluments attachment order be issued after satisfying itself that it is just and equitable that the order be issued and that the amount is appropriate."

⁵⁹ "Ground-breaking garnishee order judgement a victory for the poor" *Moneyweb* 13 September 2016 available at <https://www.moneyweb.co.za/news/south-africa/ground-breaking-garnishee-order-judgement-a-victory-for-the-poor/>, accessed on 1 March 2017.

⁶⁰ *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others; Association of Debt Recovery Agents NPC v University of Stellenbosch Legal Aid Clinic and Others; Mavava Trading 279 (Pty) Ltd and Others v University of Stellenbosch Legal Aid Clinic and Others* (CCT127/15) [2016] ZACC 32 at para 211.

⁶¹ *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others; Association of Debt Recovery Agents NPC v University of Stellenbosch Legal Aid Clinic and Others; Mavava Trading 279 (Pty) Ltd and Others v University of Stellenbosch Legal Aid Clinic and Others* (CCT127/15) [2016] ZACC 32 at para 212.

⁶² Section 83 of the NCA. If a consumer alleges that a credit agreement is reckless, the onus remains of the consumer to prove such allegation and must be proved on a balance of probabilities.

⁶³ Section 58 of MCA.

⁶⁴ S Pete...et al. *Civil Procedure: A Practical Guide*. 2 ed. (2011) 347. "Is the EAO on your pay unlawful?" *IOL* available at <http://www.iol.co.za/personal-finance/is-the-eao-on-your-pay-unlawful-1883791>, accessed on 17 April 2017.

⁶⁵ B Whittle "LSSA condemns unscrupulous garnishee practices" (2013) *De Rebus* 13. *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice And Correctional Services and Others* (16703/14) [2015] ZAWCHC 99; 2015 (5) SA 221 (WCC); [2015] 3 All SA 644 (WCC); (2015) 36 ILJ 2558 (WCC) (8 July 2015). "The incidence of and undesirable practices relating to "garnishee orders" – a follow up report" *The University of Pretoria* available at <http://archivedpublicwebsite.up.ac.za/sitefiles/file/47/327/2013%20garnishee%20orders%20follow%20up%20report.pdf>, accessed on 18 March 2017.

There has been significant controversy surrounding the abuses of the EAO process, the extent to which was highlighted by the BASA and National Treasury.⁶⁶ The BASA agreed it would advise its members not to utilise EAOs as a debt enforcement mechanism, owing to the various flaws inherent in the process.⁶⁷

1.2 Statement of Purpose and Rationale for the Study

The purpose of the dissertation is to examine the link between reckless lending and the eventual culmination of an EAO. The dissertation will also consider the legal effect of the Constitutional Court judgement in the *Stellenbosch Law Clinic* case, relating to the mandatory requirement of judicial oversight and the subsequent MCA amendments.

The key research problem revolves around whether a link between reckless credit and the culmination of an EAO exists. When EAOs are granted against an employee's salary, the problem ultimately begins when reckless credit is granted to the consumer. As alluded to above, it is essential that the pre-agreement assessment is done in good faith and reflects an accurate description of the consumer's financial affairs. Credit providers, before the *Stellenbosch Law Clinic* case, utilised EAOs as the primary debt collection mechanism to ensure that a debt was repaid.⁶⁸ Consequently, insofar as EAOs are abused by some unscrupulous credit providers and attorneys, as evidenced by empirical statistics,⁶⁹ then it seems that if reckless credit is granted, it is probable that the unscrupulous credit provider who provides the reckless credit will likely rely on EAOs.

⁶⁶ "Ensuring responsible market conduct for bank lending" *Insurance Times and Investment News* available at <http://views.itinews.co.za/Views/ViewArticle.aspx?Article=7EE1B5F8-9681-4945-80B1-0A1D8C0372C2&CID=21806&Company=National%20Treasury%20-%20Ministry%20of%20Finance#sthash.hKYm8Xzt>, accessed on 17 March 2017.

⁶⁷ "Ensuring responsible market conduct for bank lending" *Insurance Times and Investment News* available at <http://views.itinews.co.za/Views/ViewArticle.aspx?Article=7EE1B5F8-9681-4945-80B1-0A1D8C0372C2&CID=21806&Company=National%20Treasury%20-%20Ministry%20of%20Finance#sthash.hKYm8Xzt>, accessed on 17 March 2017.

⁶⁸ B Bentley. "Separating the baby and the bath water - garnishee and emoluments attachment orders." *De Rebus*. (2013).

⁶⁹ "The incidence of and the undesirable practices relating to garnishee orders in South Africa" *The National Credit Regulator* available at <https://www.ncr.org.za/documents/pages/research-reports/oct08/GARNISHEE-ORDERS-STUDY-REPORT.pdf>, accessed on 18 March 2017. "The incidence of and undesirable practices relating to "garnishee orders" – a follow up report" *University of Pretoria* available at <http://archivedpublicwebsite.up.ac.za/sitefiles/file/47/327/2013%20garnishee%20orders%20follow%20up%20report.pdf>, accessed on 1 March 2017.

There are no sound statistics to suggest that following the joint decision by the BASA and National Treasury EAOs have reduced. The problem is, once a consumer falls into a debt trap, unless intervention is sought, the chances of an EAO issued against the salary/wage increase. This dissertation will seek to inquire what would be the most appropriate method to curtail reckless lending and how this link, if in existence, to EAOs can be resolved. It is submitted that unless the law pertaining to reckless credit is strengthened, South Africans will find themselves over indebted.

1.3 Research Questions

- 1) In terms of South African law, what is reckless credit?
 - 1.1 What are the mechanisms that are required to safeguard vulnerable consumers against reckless credit?
- 2) Does a link exist between reckless credit and EAOs?
 - 2.1 How does reckless credit contribute to the problems surrounding EAOs?
- 3) In light of the *Stellenbosch Law Clinic* judgment, how are EAOs currently regulated?
 - 3.1 Is judicial oversight the solution to improve the law on EAOs?

1.4 Overview of Chapters

Chapter 2 will critically analyse the concept of reckless credit in South African law. It will be discussed with specific reference to the appropriate sections of the NCA, including case law.

Chapter 3 seeks to determine whether a link exists between reckless credit and EAOs. The chapter will consider the role of reckless lending, and how financial ignorance contributes to the detriment of consumers, when unscrupulous credit providers take advantage of consumers.

Chapter 4 will analyse EAOs and the current regulation in South African law. The High Court and Constitutional Court judgements from the *Stellenbosch Law Clinic* case will be examined, including the order from the latter court and its effect. In addition to this, the chapter will analyse the amendments to the MCA, surrounding judicial oversight and the statutory maximum of 25%. To propose an amendment to the law, the chapter

will conduct a brief foreign comparative analysis with the laws of Germany, Botswana and the United Kingdom (England and Wales) pertaining to the statutory maximum imposed by the legislature.

Chapter 5 will conclude the paper and contain recommendations surrounding reckless lending and EAOs.

1.5 Research Methodology

The research methodology for this dissertation will be qualitative in nature, utilising desktop research. This dissertation will obtain information from its main source of information from legislation such as the National Credit regulating the law pertaining to reckless credit and other matters, the Magistrates' Court Act pertaining to the law regulating EAOs. The research methodology will include published research of legal academics from accredited law journals and authoritative textbooks on the subject matters. Case law will also be drawn upon as authority. A brief comparative analysis will be conducted in chapter four, to draw comparisons to the MCA amendments and to suggest possible amendments.

Chapter 2

Reckless Credit in South Africa

2.1 Introduction

To demonstrate whether a link exists between reckless credit and EAOs, it is prudent to analyse the concept of reckless credit in South African law. Reckless credit is a new concept,⁷⁰ introduced by the legislature to ensure that consumers who apply for credit do not fall victim to over indebtedness. In line with the legislature's intention to ensure that consumers have access to safe credit and do not fall victim to predatory practices by unscrupulous credit providers, reckless credit is a crucial to South African law.⁷¹

In terms of section 80 of the NCA, a credit agreement is reckless if a credit provider fails to conduct the mandatory pre-agreement assessment.⁷² Furthermore, if a credit provider conducts a pre-agreement assessment which reveals that the consumer will become over-indebted⁷³ and nevertheless proceeds with granting such credit, this conduct will also constitute reckless credit.⁷⁴ Moreover, reckless lending will also occur where the consumer has a lack of understanding, which is further exacerbated by the general proposition that if the consumer were to enter into the credit agreement, he/she will thus be overindebted.⁷⁵

To illustrate the severity of reckless lending, the following case study creates a framework of the issue. In 2012, South Africa witnessed a catastrophic event, the Marikana massacre.⁷⁶ Mineworkers embarked on a protest, demanding that their

⁷⁰ J Otto "The History of Consumer Credit Legislation in South Africa" (2010) 16 (1) *Fundamina* 272. I Mulder *Reckless Credit Under the National Credit Act: A Comparative Analysis* (LLM thesis, University of South Africa, 2015) 10. ML Vessio "Beware the Provider of Reckless Credit" (2009) (2) *Journal of South African Law* 274. JW Scholtz...et al *Guide to the National Credit Act* (2008) 11.1.

⁷¹ JW Scholtz...et al *Guide to the National Credit Act* (2008) 11.1. JW Scholtz...et al *Guide to the National Credit Act* (2008) 11.5.1.

⁷² Section 80 (1) (a) of the NCA.

⁷³ Section 80 (1) (b) (ii) of the NCA. Section 79 (1) of the NCA defines over-indebtedness as: "if the preponderance of available information at the time a determination is made indicates that the particular consumer is or will be unable to satisfy in a timely manner all the obligations under all the credit agreements to which the consumer is a party."

⁷⁴ JW Scholtz...et al *Guide to the National Credit Act* (2008) 11.1.

⁷⁵ Section 80 (1) (b) of the NCA.

⁷⁶ M De Waal "Marikana: What really happened? We may never know" *Daily Maverick* available at <https://www.dailymaverick.co.za/article/2012-08-23-marikana-what-really-happened-we-may-never-know#.WaZk7meQzMw>, accessed on 30 August 2017. "Police shoot strikers at South Africa's Lonmin Marikana mine" *The Telegraph* available at <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/southafrica/9482175/Police-shoot-strikers-at-South-Africas-Lonmin-Marikana-mine.html>, accessed on 30 August 2017.

wages increase. A reason the protests erupted and the demand for an increase in wages was made was because many mineworkers were deep in debt.⁷⁷ Upon investigation by the NCR, it was found that some credit providers in the Marikana area were not complying with the NCA.⁷⁸

The NCR found that these bogus credit providers were engaging in reckless lending and failed to conduct thorough pre-agreement assessments, especially failing to make a just determination to ascertain affordability.⁷⁹ When some mineworkers were paid their remuneration, their financial woes would only deepen as they were left with very little after paying off existing debt.⁸⁰ The Marikana massacre is one of many stories, which illustrates how vulnerable consumers are taken advantage of and how the NCA failed to enforce its mandate, before the amendments of 2014.⁸¹

Since South Africa has an active credit market,⁸² adequate protection of the consumer is essential. From a historic perspective, the NCA was introduced as previous legislation did not provide adequate protection to consumers.⁸³ This included credit providers not revealing to consumers the exact amount that they would be expected to pay, once interest and other costs were added to the original price of the item.⁸⁴

⁷⁷ D James "Deeper into a Hole? Borrowing and Lending in South Africa" (2014) 55 (9) *Current Anthropology* 22.

⁷⁸ *National Credit Regulator v Rustmar CC* (NCT/8615/2013/57(1)) [2014] ZANCT 21 (23 May 2014). "Annual Report 2012" *Credit Ombud* available at http://www.creditombud.org.za/wp-content/uploads/2015/11/Credit_Ombud_Annual_Report_2012_1370586659.pdf, accessed on 16 August 2017. "Annual Report 2012/13" *National Credit Regulator* available at <https://www.ncr.org.za/documents/pages/Annual%20Reports/NCR+ANNUAL+REPORT+2012-13.pdf>, accessed on 16 August 2017.

⁷⁹ "Annual Report 2012/13" *National Credit Regulator* available at <https://www.ncr.org.za/documents/pages/Annual%20Reports/NCR+ANNUAL+REPORT+2012-13.pdf>, accessed on 16 August 2017. P Bond "Debt, uneven development and capitalist crisis in South Africa: from Marikana microfinance mashonisas to Moody's macroeconomic monitoring" available at <http://ccs.ukzn.ac.za/files/Bond%20Berlin%20paper%20on%20debt%20and%20uneven%20development%20in%20contemporary%20South%20Africa.pdf>, accessed on 16 August 2017. "The New Credit Law will Enable Government to Crack on Illegal Lenders" *The Department of Trade and Industry* available at <http://www.dti.gov.za/editmedia.jsp?id=3043>, accessed on 16 August 2017.

⁸⁰ "NCR raises alarm at unsecured lending in Marikana" *Mail and Guardian* available at <https://mg.co.za/article/2012-10-11-ncr-raises-alarm-at-unsecured-lending-in-marikana/>, accessed on 25 April 2017.

⁸¹ M Bateman "South Africa's post-apartheid microcredit-driven calamity" (2014) 18 (1) *Law, Democracy and Development* 118.

⁸² As at March 2017, statistics from the NCR revealed that the credit market new credit totalled R116.46 billion with 9.53 million credit applications. "Consumer Credit Market Report" *National Credit Regulator* available at <http://debtfreedigi.co.za/wp-content/uploads/2017/08/CCMR-March-2017.pdf>, accessed on 20 December 2017.

⁸³ T Woker "Why the need for consumer protection legislation? A look at some of the reasons behind the promulgation of the National Credit Act and the Consumer Protection Act" (2010) 31 (2) *Obiter* 225.

⁸⁴ T Woker "Why the need for consumer protection legislation? A look at some of the reasons behind the promulgation of the National Credit Act and the Consumer Protection Act" (2010) 31 (2) *Obiter* 226.

Furthermore, the socio-economic problems present in South Africa led to the promulgation of the NCA.⁸⁵ Stoop identifies socio-economic problems such as: consumers lack of educational, imbalance between credit providers and consumers, lack of financial knowledge and credit providers not providing a full disclosure of the contracts consumers were entering into.⁸⁶

Due to the fact that South Africa has a blooming credit market and emerging middle class following apartheid, the NCA was crucial in terms of safeguarding the economy along with consumers.⁸⁷ In light of the fact that the NCA was introduced into South African law before the 2008 recession,⁸⁸ it managed to safeguard consumers to an extent from the devastating effects of the credit crunch by ensuring that credit was not overextended.⁸⁹

Section 172 of the NCA repealed previous credit legislation such as: the Usury Act,⁹⁰ the Credit Agreements Act⁹¹ and the Integration of Usury Laws Act.⁹² In light of South Africa's discriminatory past and Apartheid, the majority were excluded from accessing credit products and services.⁹³ Thus, the NCA seeks to ensure that there is inclusion of all South Africans in the credit market.⁹⁴

While the NCA has sought to improve the stance on access to credit and give improved protection to consumers and the economy, it has presented its own problems. In the context of reckless credit, it was found that the NCA initially created more problems than solutions, thus the amendment to the NCA in 2014.⁹⁵ This chapter will examine

⁸⁵ P Stoop "South African consumer credit policy: measures indirectly aimed at preventing consumer over-indebtedness" (2009) 21 (3) *SA Mercantile Law Journal* 366.

⁸⁶ P Stoop "South African consumer credit policy: measures indirectly aimed at preventing consumer over-indebtedness" (2009) 21 (3) *SA Mercantile Law Journal* 366.

⁸⁷ JM Otto *The National Credit Act Explained* 3 ed. (2013) 2.

⁸⁸ "SA's Recession: how did we get into this mess?" *News 24* <https://www.news24.com/MyNews24/SAs-Recession-how-did-we-get-into-this-mess-20140610> (Accessed: 27 November 2017).

⁸⁹ JM Otto *The National Credit Act Explained* 3 ed. (2013) 2. J Otto "The History of Consumer Credit Legislation in South Africa" (2010) 16 (1) *Fundamina* 273.

⁹⁰ Act 73 of 1968.

⁹¹ Act 75 of 1980.

⁹² Act 57 of 1996. JW Scholtz...et al *Guide to the National Credit Act* (2008) 2.1.

⁹³ JW Scholtz...et al *Guide to the National Credit Act* (2008) 2.1.

⁹⁴ JW Scholtz...et al *Guide to the National Credit Act* (2008) 2.1.

⁹⁵ JW Scholtz...et al *Guide to the National Credit Act* (2008) 2.1. "Ensuring responsible market conduct for bank lending" *Insurance Times and Investment News* available at <http://views.itinews.co.za/Views/ViewArticle.aspx?Article=7EE1B5F8-9681-4945-80B1-0A1D8C0372C2&CID=21806&Company=National%20Treasury%20-%20Ministry%20of%20Finance#sthash.hKYm8Xzt>, accessed on 16 August 2017. The Banking Association of South Africa (hereafter referred to as BASA) and National Treasury found that

the previous stance initially proposed in the NCA and the subsequent amendments in 2014. It will also include commentary on the current position pertaining to reckless credit. This chapter will examine the concept of reckless credit and the safeguards which should be implemented to curtail reckless lending by unscrupulous credit providers.

2.2 Reckless Credit under the National Credit Act

2.2.1 Introduction

The NCA defines reckless credit as “the credit granted to a consumer under a credit agreement concluded in circumstances described in section 80.” The legislature envisages curtailing reckless lending practices through promoting responsibility in the credit market by encouraging responsible borrowing, avoidance of over-indebtedness and fulfilment of financial obligations by consumers,⁹⁶ and discouraging reckless credit granting by credit providers and contractual default by consumers.⁹⁷ The NCA also seeks to achieve the purpose of addressing and preventing over-indebtedness of consumers, and providing mechanisms for resolving over-indebtedness based on the principle that consumers must fulfil their financial obligations.⁹⁸

2.2.2 Instances of Reckless Credit

unscrupulous credit providers were engaging in practices such as reckless lending, thus contributing to over-indebtedness. It was also observed that there was an abuse in debt collection practices and the obtaining of garnishee orders and EAOs. This was evidenced by statistics obtained from the South African Reserve Bank which illustrated that household debt to disposable income was 76.3% during the second quarter of 2012. BASA and National Treasury agreed that some form of mechanism was required to perform pre-agreement assessments, with an aim to resolve the issue of reckless lending. “Joint statement by the Minister of Finance and the chairperson of the Banking Association of South Africa” *National Treasury* available at http://www.treasury.gov.za/comm_media/press/2012/2012110101.pdf, accessed on 16 August 2017.

⁹⁶ Section 3 (c) (i) of the NCA.

⁹⁷ Section 3 (c) (ii) of the NCA.

⁹⁸ Section 3 (g) of the NCA.

In terms of section 80⁹⁹ and 81¹⁰⁰ of the NCA, reckless credit can occur when a credit provider fails to conduct a pre-agreement assessment of the consumer. A pre-agreement assessment is a mandatory financial assessment which the credit provider must conduct, before granting the consumer the requisite credit. The consumer's financial documents must be thoroughly examined to ascertain if he/she can afford the credit repayments. The mandatory nature of a pre-agreement assessment is a safeguard for both credit provider and consumer to ensure that the latter can afford the total cost of the credit. Furthermore, it is vital for a healthy credit market that consumers can repay credit providers the capital and interest of the credit.

According to section 80 of the NCA, the first instance of reckless lending occurs under section 80 (1) (a) of the NCA. This is when a credit provider fails to outright conduct a pre-agreement assessment of the consumer.¹⁰¹ Failure to conduct the pre-agreement

⁹⁹ (1) A credit agreement is reckless if, at the time that the agreement was made, or at the time when the amount approved in terms of the agreement is increased, other than an increase in terms of section 119(4) -

- (a) the credit provider failed to conduct an assessment as required by section 81(2), irrespective of what the outcome of such an assessment might have concluded at the time; or
- (b) the credit provider, having conducted an assessment as required by section 81(2), entered into the credit agreement with the consumer despite the fact that the preponderance of information available to the credit provider indicated that -

- (i) the consumer did not generally understand or appreciate the consumer's risks, costs or obligations under the proposed credit agreement; or

- (ii) entering into that credit agreement would make the consumer overindebted.

(2) When a determination is to be made whether a credit agreement is reckless or not, the person making that determination must apply the criteria set out in subsection (1) as they existed at the time the agreement was made, and without regard for the ability of the consumer to risks, costs or obligations under the proposed credit agreement; or

- (a) meet the obligations under that credit agreement; or
- (b) understand or appreciate the risks, costs and obligations under the proposed credit agreement, at the time the determination is being made.

¹⁰⁰ (1) When applying for a credit agreement, and while that application is being considered by the credit provider, the prospective consumer must fully and truthfully answer any requests for information made by the credit provider as part of the assessment required by this section.

(2) A credit provider must not enter into a credit agreement without first taking reasonable steps to assess -

- (a) the proposed consumer's-
 - (i) general understanding and appreciation of the risks and costs of the proposed credit, and of the rights and obligations of a consumer under a credit agreement;
 - (ii) debt re-payment history as a consumer under credit agreements;
 - (iii) existing financial means, prospects and obligations; and
- (b) whether there is a reasonable basis to conclude that any commercial purpose may prove to be successful, if the consumer has such a purpose for applying for that credit agreement.

¹⁰¹ S80 (1) (a) of the NCA: the credit provider failed to conduct an assessment as required by section 81(2), irrespective of what the outcome of such an assessment might have concluded at the time.

assessment automatically renders the agreement reckless.¹⁰² According to *National Credit Regulator v Hirst*,¹⁰³ it is peremptory for a credit provider to ensure that a pre-agreement assessment of the consumer is conducted. Moreover, if a consumer qualified for the credit and a pre-agreement assessment would merely reaffirm such qualification, the pre-agreement assessment must still be conducted in conformity with section 80 and 81 of the NCA.¹⁰⁴

It is submitted that credit providers must take every reasonable step to ensure that a pre-agreement assessment of the consumer is conducted, in a thorough fashion.¹⁰⁵ Furthermore, a credit provider must conduct a pre-agreement assessment with the same degree of care and skill for all consumers. Thus, irrespective of the consumer's income capacity, this mandatory pre-agreement assessment must be conducted in a conformed fashion, considering all relevant factors of the consumer.

The second instance of reckless credit occurs under section 80 (1) (b) of the NCA. This is when a credit provider conducts the pre-agreement assessment in terms of section 81 (2) of the NCA, however, the credit provider ignores the fact that based on the information before him/her that the consumer failed on the requirements as per the NCA.¹⁰⁶ This conduct is deemed to be reckless because despite the fact that a pre-agreement assessment was conducted, the credit provider ignored the requirements dictated by the NCA.¹⁰⁷ It appears therefore as if the legislature envisaged that the consumer understand the process of how credit works and the actual amount of

Absa Bank v Trustees for the Time Being of the Coe Family Trust and Others (24190/2009) [2010] ZAWCHC 206; 2012 (3) SA 184 (WCC) (1 September 2010): "Section 81(4) needs to be read together with section 81(2). It clearly gives the credit provider a defence in terms of the overall purpose of the Act, to ensure fairness to both parties in circumstances where the consumers fail to fully and truthfully answer any request for information made by the credit provider as part of its assessment. But, if an assessment was not undertaken in the first place, then section 81(4) is of no relevance."

¹⁰² JW Scholtz...et al *Guide to the National Credit Act* (2008) 11.5.2.

¹⁰³ [2015] ZANCT 18 (29 October 2015) at para 13.

¹⁰⁴ See section 80 (1) (a) of the NCA. JW Scholtz...et al *Guide to the National Credit Act* (2008) 11.5.2.

¹⁰⁵ P Stoop and M Kelly-Louw "The National Credit Act Regarding Suretyships and Reckless Lending" (2011) 14 (2) *Potchefstroom Electronic Law Journal* 88.

¹⁰⁶ Section 80 (1) (b) of the NCA: (b) the credit provider, having conducted an assessment as required by section 81(2), entered into the credit agreement with the consumer despite the fact that the preponderance of information available to the credit provider indicated that -

(i) the consumer did not generally understand or appreciate the consumer's

(ii) entering into that credit agreement would make the consumer over indebted.

¹⁰⁷ See section 80 (1) (b) (i) and (ii) of the NCA. JW Scholtz...et al *Guide to the National Credit Act* (2008) 11.5.2.

money that is going towards repaying the debt, thus promoting and ensuring transparency.¹⁰⁸

From a consumer protection perspective, the second instance seeks to guard a consumer against an unscrupulous credit provider. Moreover, in promoting transparency, the consumer is actively involved throughout the entire process. The second instance is important to curtail reckless lending because it creates a duty upon credit providers to engage with the material before them such as the proof of income documents and the consumer herself. Furthermore, it is vital that credit providers guard against creating over-indebtedness and uninformed consumers, who are not aware of their obligations and associated risks of the credit agreement.

The third instance of reckless credit is envisaged by section 80 (1) (b) (ii) of the NCA.¹⁰⁹ It refers to a scenario where reckless credit could lead to indebtedness.¹¹⁰ When a consumer approaches a credit provider, it may well be that he/she is not over indebted at that point in time, however, a situation could arise whereby the consumer becomes indebted at a further point in time by him/her entering into the credit agreement.¹¹¹

It is submitted that in such a situation, the credit provider needs to exercise caution in such a situation and not merely adopt a tick approach. There is an onerous duty upon a credit provider to ensure that a thorough assessment is conducted of the consumer, to guard against such an occurrence. A credit provider must scrutinise the information before him/her to ensure that the credit agreement which the consumer wishes to enter will not in fact render him/her over-indebted.¹¹² To balance this aspect, a credit provider should ideally be required to only verify information where there appears to be a doubt surrounding its veracity. It would be time consuming and probably counterproductive for credit providers to be expected to verify all documents that consumers adduce.

It appears as if the legislature envisaged a comprehensive approach to pre-agreement assessments and curtailing reckless lending.¹¹³ Apart from considering a consumer's

¹⁰⁸ JW Scholtz...et al *Guide to the National Credit Act* (2008) 11.5.2.

¹⁰⁹ Section 80 (1) (b) (ii) of the NCA: entering into that credit agreement would make the consumer overindebted.

¹¹⁰ JW Scholtz...et al *Guide to the National Credit Act* (2008) 11.5.2.

¹¹¹ JW Scholtz...et al *Guide to the National Credit Act* (2008) 11.5.2.

¹¹² JW Scholtz...et al *Guide to the National Credit Act* (2008) 11.5.2.

¹¹³ M Kelly-Louw "A Credit Provider's Complete Defence Against a Consumer's Allegation of Reckless Lending" (2014) 26 (1) *SA Mercantile Law Journal* 32.

financial position, a credit provider must ensure that the consumer does understand the credit agreement.¹¹⁴ Moreover, the time at which a credit agreement was entered remains crucial to the process as it provides an indication of reckless credit and the understanding of the consumer.¹¹⁵ The third instance requires a credit provider to apply their mind and engage with the financial information of the consumer, in a manner which provides responsible credit and enhances the consumer's credit wellbeing. Furthermore, it remains trite that a consumer must not become over-indebted whereby he/she will be in a state which renders them unable to adequately fulfil their obligations under the credit agreement.

Section 81 of the NCA appears to impose an onerous burden upon the credit provider, to ensure compliance with the section to curtail reckless lending. Upon an examination of the wording in section 81, the interpretation of the section leads one to believe that the legislature envisaged that the section be peremptory.¹¹⁶ As the pre-agreement assessment is an integral aspect of the credit determination process, a credit provider is under an obligation to ensure that the section is complied with and a thorough assessment is conducted.¹¹⁷ While credit providers have an onerous duty upon them, the consumer applying for credit also has a duty to ensure that he/she makes a truthful disclosure about his/her financial position.¹¹⁸

2.2.3 The Defence of Reckless Credit

If a consumer finds that a credit provider seeks to enforce a credit agreement that is inherently reckless, a consumer can raise this unlawful conduct as a complete defence to reckless credit.¹¹⁹ This is a statutory defence as outlined in the NCA and will be determined on the merits if raised by the consumer when a credit provider seeks to enforce the agreement.¹²⁰ For a credit provider to counteract an allegation of reckless

¹¹⁴ M Kelly-Louw "A Credit Provider's Complete Defence Against a Consumer's Allegation of Reckless Lending" (2014) 26 (1) *SA Mercantile Law Journal* 32.

¹¹⁵ M Kelly-Louw "A Credit Provider's Complete Defence Against a Consumer's Allegation of Reckless Lending" (2014) 26 (1) *SA Mercantile Law Journal* 32.

¹¹⁶ JW Scholtz...et al *Guide to the National Credit Act* (2008) 11.5.3.

¹¹⁷ JW Scholtz...et al *Guide to the National Credit Act* (2008) 11.5.3.

¹¹⁸ P Stoop "South African consumer credit policy: measures indirectly aimed at preventing consumer over-indebtedness" (2009) 21 (3) *SA Mercantile Law Journal* 368.

¹¹⁹ JW Scholtz...et al *Guide to the National Credit Act* (2008) 11.5.5.

¹²⁰ JW Scholtz...et al *Guide to the National Credit Act* (2008) 11.5.1. C van Heerden and A Boraine "The money or the box: perspectives on reckless credit in terms of the National Credit Act 34 of 2005" (2011) 44 (2) *De Jure* 411.

credit and when attempting to enforce such agreement, it must be set out in the particulars of claim that the pre-agreement assessment was conducted.¹²¹

From a practical perspective, the defence of reckless credit may be raised by a consumer when the credit provider seeks to enforce the reckless credit agreement against the consumer.¹²² In theory, the consumer can raise this before the credit provider seeks to enforce the credit agreement. From the perspective of the consumer, he/she can challenge this at any point for the agreement to be set aside based on reckless credit. If the matter reaches the point of summary judgement, as with all proceedings at this stage, the defendant must show that he/she has a *bona fide* defence.¹²³ Furthermore, when an allegation of reckless credit is made, the consumer must provide sufficient and material information.¹²⁴ This includes the defence he/she is relying on and the nature of it.¹²⁵ The procedure follows basic civil law norms and the civil standard of a balance of probabilities.

In terms of section 81 (4)¹²⁶ of the NCA, a credit provider will defeat a reckless credit claim if it can be shown that the consumer failed to provide the correct information at the pre-agreement assessment stage. As alluded to previously, this section requires a consumer to make a truthful disclosure and answer all questions with accurate information. If it becomes apparent to the credit provider that the consumer was dishonest in his/her disclosure in furnishing information to complete the pre-agreement assessment, the Court or Tribunal presiding over the matter must then determine whether this misrepresentation had a link to the credit provider concluding his/her

¹²¹ C van Heerden and A Boraine "The money or the box: perspectives on reckless credit in terms of the National Credit Act 34 of 2005" (2011) 44 (2) *De Jure* 411.

¹²² C van Heerden and A Boraine "The money or the box: perspectives on reckless credit in terms of the National Credit Act 34 of 2005" (2011) 44 (2) *De Jure* 411.

¹²³ Rule 14 of the Magistrates Court Rules.

¹²⁴ C van Heerden and A Boraine "The money or the box: perspectives on reckless credit in terms of the National Credit Act 34 of 2005" (2011) 44 (2) *De Jure* 412.

¹²⁵ C van Heerden and A Boraine "The money or the box: perspectives on reckless credit in terms of the National Credit Act 34 of 2005" (2011) 44 (2) *De Jure* 412.

¹²⁶ For all purposes of this Act, it is a complete defence to an allegation that a credit agreement is reckless if -

(a) the credit provider establishes that the consumer failed to fully and truthfully answer any requests for information made by the credit provider as part of the assessment required by this section; and

(b) a court or the Tribunal determines that the consumer's failure to do so materially affected the ability of the credit provider to make a proper assessment.

assessment.¹²⁷ A Court or Tribunal must be able to determine whether the pre-agreement assessment would have revealed another result, however, if the information reveals that an aspect relevant to the determination would not quite affect the final outcome, then such defence will fail.¹²⁸

If a consumer alleges reckless credit, he/she bears the onus of proof on a balance of probabilities.¹²⁹ In aiming to successfully raise this complete defence,¹³⁰ a consumer is required to provide as much information as possible to substantiate such claim; consumers must also be warned against making vague allegations which contain no substance in proving reckless credit.¹³¹ This is to ensure that there is transparency and sufficient information to enable the credit provider to respond adequately.¹³²

In light of the fact that reckless credit is a new concept in South African law, the jurisprudence is still developing. Nonetheless, there is case law which has sought to explain the concept of reckless credit and its associated defences.¹³³

2.2.4 Analysis of Applicable Case Law

In the case of *Mbatha*,¹³⁴ the defendant raised the defence of reckless credit at the stage of summary judgement against a credit agreement. The Court acknowledged that the NCA allows for a balancing act between the rights of credit providers and consumers.¹³⁵ Thus, it remains vital that even if all obligations are suspended under the credit agreement by virtue of a successful defence of reckless credit, it would be inequitable for the consumer to still retain the asset.¹³⁶

¹²⁷ JW Scholtz...et al *Guide to the National Credit Act* (2008) 11.5.5.

¹²⁸ JW Scholtz...et al *Guide to the National Credit Act* (2008) 11.5.5.

¹²⁹ M Kelly-Louw "A Credit Provider's Complete Defence Against a Consumer's Allegation of Reckless Lending" (2014) 26 (1) *SA Mercantile Law Journal* 43.

¹³⁰ JW Scholtz...et al *Guide to the National Credit Act* (2008) 11.2.

¹³¹ M Kelly-Louw "A Credit Provider's Complete Defence Against a Consumer's Allegation of Reckless Lending" (2014) 26 (1) *SA Mercantile Law Journal* 43 quoting *SA Taxi Securitisation (Pty) Ltd v Mbatha*; *SA Taxi Securitisation (Pty) Ltd v Molete*; *SA Taxi Securitisation (Pty) Ltd v Makhoba* (51330/09, 52948/09, 53080/09) [2010] ZAGPJHC 24; 2011 (1) SA 310 (GSJ) (30 March 2010).

¹³² C van Heerden and A Boraine "The money or the box: perspectives on reckless credit in terms of the National Credit Act 34 of 2005" (2011) 44 (2) *De Jure* 411.

¹³³ *Standard Bank of South African Ltd v Kelly and Another* (23427/2010) [2011] ZAWCHC 1 (25 January 2011). *Absa Bank Limited v De Beer and Others* (26749/2011) [2015] ZAGPPHC 903; 2016 (3) SA 432 (GP) (18 December 2015). *Absa Bank Limited v Potgieter* (2344/2013) [2017] ZAECPHC 8 (31 January 2017).

¹³⁴ *SA Taxi Securitisation (Pty) Ltd v Mbatha*; *SA Taxi Securitisation (Pty) Ltd v Molete*; *SA Taxi Securitisation (Pty) Ltd v Makhoba* (51330/09, 52948/09, 53080/09) [2010] ZAGPJHC 24; 2011 (1) SA 310 (GSJ) (30 March 2010).

¹³⁵ Para 31.

¹³⁶ Para 54.

The Court held that to successfully raise the defence of reckless credit, it must be shown:¹³⁷

- 1) Details about negotiations ought to be included leading up to the conclusion of the credit agreement, including parties involved, details about the credit agreement and circumstances under which it was signed.¹³⁸
- 2) The defendant must disclose his/her education and experience at the time of the pre-agreement assessment. Furthermore, the defendant ought to have also disclosed previous credit transactions entered into.¹³⁹
- 3) In the event the defendant raised over-indebtedness, this must be proved at the time the credit transaction was entered into. This includes information about the defendant's potential income and expenditure. To substantiate the third aspect, the defendants were required to disclose the revenue that they would derive from the assets.¹⁴⁰
- 4) Information must be presented illustrating the defendant's current level of indebtedness. To substantiate this, the defendant must furnish income and expenditure related information. This would enable the court to make a just determination about whether to suspend or set aside the credit agreement.¹⁴¹

As the jurisprudence on reckless credit is still developing, these guidelines from *Mbatha* could be useful in providing guidance to a consumer who finds himself/herself trapped in a reckless credit agreement. Moreover, it would assist a consumer in successfully proving reckless credit. It appears as if these guidelines are stringent upon a consumer and rightfully this onus should be upon the credit provider.¹⁴² The opposing view, congruent with civil procedure principles is that the credit provider ought to make the necessary allegations in the particulars of claim, pertaining to the pre-agreement assessment.¹⁴³

¹³⁷ Levenberg AJ made the following remarks as to what would constitute sufficient information to raise a successful defence of reckless credit, in paragraph 55 of the judgement.

¹³⁸ Para 55.

¹³⁹ Para 55.

¹⁴⁰ Para 55.

¹⁴¹ Para 55.

¹⁴² C van Heerden and A Boraine "The money or the box: perspectives on reckless credit in terms of the National Credit Act 34 of 2005" (2011) 44 (2) *De Jure* 412.

¹⁴³ C van Heerden and A Boraine "The money or the box: perspectives on reckless credit in terms of the National Credit Act 34 of 2005" (2011) 44 (2) *De Jure* 413.

Furthermore, if the consumer wishes to defend such allegation to prove the contrary, sufficient material information must be produced.¹⁴⁴ From a perspective of over-indebtedness, it would strengthen the consumer's defence if he/she discloses that before entering into the credit agreement, a truthful disclosure about his/her financial affairs was made.¹⁴⁵

From an academic perspective, the *Mbatha* judgement is viewed as a useful set of guidelines if the consumer raises a defence of reckless credit.¹⁴⁶ In as much as the court provided comprehensive guidelines, it is argued that the court did not intend to create binding guidelines in the South African jurisprudence.¹⁴⁷ On the contrary, it is viewed as providing some sort of guidance to courts regarding the information that needs to be furnished when a defence of reckless credit is raised.¹⁴⁸

Mbatha is a judgement which is indicative of idealistic reasoning from the judiciary because it does not recognise the difficulties that consumers face when dealing with a credit provider. An implication of the guidelines from *Mbatha* could be that even though a consumer has a *bona fide* defence, the onus to discharge is far too onerous. Unfortunately, consumers are in a weaker position and ignorance of the law is prevalent, owing to South Africa's socio-economic framework. When faced with litigation, a consumer owing to ignorance of the law may not have the required documents and information to successfully prove reckless credit, as proposed in *Mbatha*. It is submitted that the judiciary must be cognisant of the practical realities facing South Africans and thus set guidelines which can be proven in court along with information easily accessible.

¹⁴⁴ C van Heerden and A Boraine "The money or the box: perspectives on reckless credit in terms of the National Credit Act 34 of 2005" (2011) 44 (2) *De Jure* 413.

¹⁴⁵ C van Heerden and A Boraine "The money or the box: perspectives on reckless credit in terms of the National Credit Act 34 of 2005" (2011) 44 (2) *De Jure* 413.

¹⁴⁶ M Kelly-Louw "A Credit Provider's Complete Defence Against a Consumer's Allegation of Reckless Lending" (2014) 26 (1) *SA Mercantile Law Journal* 45. Since the judgement, these guidelines have not been adopted by our courts. To demonstrate the effectiveness and the treatment of the *Mbatha* judgement, it was referred to in *FirstRand Bank Ltd v Mvelase* (4096/10) [2010] ZAKZPHC 74; 2011 (1) SA 470 (KZP) (26 October 2010) and considered in *Pelzer v Nedbank Ltd* (2011 (4) SA 388 (GNP)) [2010] ZAGPPHC 119; 14160/09 (17 September 2010).

¹⁴⁷ M Kelly-Louw "A Credit Provider's Complete Defence Against a Consumer's Allegation of Reckless Lending" (2014) 26 (1) *SA Mercantile Law Journal* 45.

¹⁴⁸ M Kelly-Louw "A Credit Provider's Complete Defence Against a Consumer's Allegation of Reckless Lending" (2014) 26 (1) *SA Mercantile Law Journal* 45.

In the case of *Horwood v First Rand Bank Ltd*,¹⁴⁹ the applicant approached the court to set aside a credit agreement with the credit provider on the grounds that it was reckless. The applicant unsuccessfully raised the argument that the credit provider was required to verify the documents for the pre-agreement assessment.¹⁵⁰ *Horwood* adds to the South African credit law jurisprudence as authority for the fact that while a credit provider is not expected to verify information, the credit provider is required to verify information where there appears to be a discrepancy.¹⁵¹ For example, this would be the case where an amount appears unreasonably low for fuel expenses where it is common knowledge that the consumer frequently travels.¹⁵²

2.2.5 Conclusion

The case law pertaining to reckless credit has in some instances interpreted the NCA and created stringent guidelines. Moreover, the information required to raise a defence of reckless credit creates onerous obligations upon consumers. While reckless credit and its associated defence are new concepts to South African law, the NCA appeared to be in dire need of amendment to create some form of uniformity regarding how pre-agreement assessments are conducted.

2.3 The Affordability Assessment Guidelines and Amendment to the NCA

2.3.1 Introduction

As discussed above, the pre-agreement assessment forms an integral part of the credit granting process.¹⁵³ Before the amendment to the NCA, the position was problematic pertaining to the assessment models and mechanisms which credit providers utilised to make their determination.¹⁵⁴ It was problematic because credit providers could determine their own mechanisms to conduct pre-agreement assessments, leading to no conformity in the credit industry.¹⁵⁵

¹⁴⁹ [2011] ZAGPJHC 121 (21 September 2011).

¹⁵⁰ At para 14.

¹⁵¹ M Kelly-Louw "A Credit Provider's Complete Defence Against a Consumer's Allegation of Reckless Lending" (2014) 26 (1) *SA Mercantile Law Journal* 52.

¹⁵² M Kelly-Louw "A Credit Provider's Complete Defence Against a Consumer's Allegation of Reckless Lending" (2014) 26 (1) *SA Mercantile Law Journal* 52.

¹⁵³ See 2.2 above.

¹⁵⁴ See 2.2 above.

¹⁵⁵ JW Scholtz...et al *Guide to the National Credit Act* (2008) 11.5.6.

2.3.2 Drafting and Interpretational Difficulties With the NCA

Otto identifies three judgements where judges expressed their dissatisfaction with the NCA as it created more problems for the courts, as opposed to providing solutions for the credit industry and consumers.¹⁵⁶ From the passages quoted by Otto, it is evident that the judges face problems in interpreting the sections of the NCA. The passages reveal that besides an interpretation hurdle, the legislation is probably not appropriate for South Africa and contains significant foreign influence.¹⁵⁷

This is a problem because certain concepts may be unknown to South African law and are not suited to the landscape of the country's legal problems. Furthermore, the foreign influence found in South African law does not take cognisance of the socio-economic factors and other problems present in the country.¹⁵⁸

It is submitted that Otto and van Deventer concur with the proposition that there has been a significant amount of foreign influence that the legislature relied on to draft certain key aspects of the NCA.¹⁵⁹ With regards to the legislature not taking the requisite care to draft the NCA to suit South Africa, it appears as if certain aspects such as ensuring a balancing act between consumers and credit providers needed to be entrenched and introduced.¹⁶⁰

While the NCA is lawful and binding upon credit providers and consumers, the fact that the judiciary has been vocal in their criticism about the NCA should be concerning

¹⁵⁶ J Otto "National Credit Act *Vanwaar Gehási? Quo vadit lex?* And some reflections on the National Credit Amendment Act 2014 (part 1)" (2015) *Tydskrif vir die Suid-Afrikaanse Reg* 584. Cases referred to by Otto at 585. *FirstRand Bank Ltd v Seyffert* 2010 6 SA 429 (GSJ) at para 10: "I share the general frustration of my judicial colleagues around the country at the lack of clarity that features at least in the parts of the NCA with which one is concerned in cases of the kind now before me. A court is forced to go round and round in loops from subsection to subsection, much like a dog chasing its tail. Indeed, the language used in the Act from time to time suggests that foreign draftspersons rather than South African lawyers had a strong hand in preparing the text." *Nedbank Ltd v National Credit Regulator* 2011 3 SA 581 (SCA) at para 2: "Numerous drafting errors, untidy expressions and inconsistencies make its interpretation a particularly trying exercise."

Starita v Absa Bank Ltd 2010 3 SA 443 (GSJ) at para 18.9: "The fact is that it is a badly drafted Act."

¹⁵⁷ J Otto "National Credit Act *Vanwaar Gehási? Quo vadit lex?* And some reflections on the National Credit Amendment Act 2014 (part 1)" (2015) *Tydskrif vir die Suid-Afrikaanse Reg* 585 quoting Seyffert.

¹⁵⁸ J Otto "National Credit Act *Vanwaar Gehási? Quo vadit lex?* And some reflections on the National Credit Amendment Act 2014 (part 1)" (2015) *Tydskrif vir die Suid-Afrikaanse Reg* 584.

¹⁵⁹ S van Deventer "The enforcement of credit agreements through set-off: Evaluating the impact of the National Credit Act 34 of 2005" (2017) Part 2 *The South African Law Journal* 429.

¹⁶⁰ S van Deventer "The enforcement of credit agreements through set-off: Evaluating the impact of the National Credit Act 34 of 2005" (2017) Part 2 *The South African Law Journal* 440.

to government.¹⁶¹ The criticism pertaining to interpretation difficulties and other aspects of the NCA are valid because the judiciary plays a significant role in consumer protection.

The judiciary is important from an interpretation perspective as it ultimately delivers justice to the public and provides guidance through case law. The government policy in relation to the NCA is rational and lawful,¹⁶² however, such commentary and criticism should be welcomed as it would assist government in formulating its policy in a manner which is practical; furthermore, this would entrench the ideals of consumer protection and ensure the true purpose of the NCA is fulfilled.

2.3.3 Lack of Conformity with Pre-Agreement Assessments

Originally, section 81 of the NCA gave credit providers freedom to determine their own assessment models and mechanisms, to conduct pre-agreement assessments.¹⁶³ While this remained the position since the inception of the NCA, the NCR was permitted to approve evaluative mechanisms and models. Furthermore, the NCR was to publish guidelines as to what these evaluative mechanisms and models should encompass.¹⁶⁴

The previous position pertaining to section 81 was problematic¹⁶⁵ and not well suited to the credit industry. It is submitted that it gave credit providers an unlimited amount of freedom/discretion which in turn was abused; this abuse led to the circumvention of the NCA and plunged consumers further into a vicious cycle of reckless lending and over-indebtedness. Moreover, it appears as if there was insufficient oversight over the credit industry and the mechanisms employed by credit providers.

¹⁶¹ J Otto "National Credit Act *Vanwaar Gehási? Quo vadit lex?* And some reflections on the National Credit Amendment Act 2014 (part 1)" (2015) *Tydskrif vir die Suid-Afrikaanse Reg* 584.

¹⁶² JW Scholtz...et al *Guide to the National Credit Act* (2008) 2.2.

¹⁶³ S Monty "Affordability assessment regulations: consumer law / NCA" (2014) 14 (9) *Without Prejudice* 29. The position prior to the amendment was problematic as there was no conformity in the credit industry, pertaining to pre-agreement assessment models and mechanisms. Furthermore, it remained unclear how these pre-agreement assessments were being conducted. Another aspect which reaffirmed how problematic this was, was the prevalence of reckless credit and over-indebtedness of consumers. JW Scholtz...et al *Guide to the National Credit Act* (2008) 2.1.

¹⁶⁴ Section 82 (2) (b).

¹⁶⁵ S Monty "Affordability assessment regulations: consumer law / NCA" (2014) 14 (9) *Without Prejudice* 29.

A drawback in terms of section 82 (3), which was like self-regulation,¹⁶⁶ was that these guidelines were not binding upon credit providers; it is submitted that such drawback gave credit providers further freedom to engage in unscrupulous lending practices. If it was found that a credit provider utilised evaluative mechanisms and models, which led to an unfair determination, to the detriment of the consumer, the NCR could apply to the Tribunal under the then section 82 (4). The Tribunal could then order the credit provider to comply with guidelines published by the NCR or guidelines that were congruent with the industry norms and practices.¹⁶⁷

From the inception of the NCA and its purpose, it is evident that the legislature envisaged preventing reckless credit. Due to the fact that credit providers were given complete freedom to determine their own evaluative models and mechanisms, the absence of legally binding guidelines curtailed the fulfilment of the objective to curtail reckless lending.¹⁶⁸ In the absence of these legally binding guidelines, the Courts were tasked with evaluating a credit provider's evaluative models and mechanisms, to determine if a fair pre-agreement assessment was conducted.¹⁶⁹ It is submitted that while the courts sought to provide guidance on what constituted a proper pre-agreement assessment, the credit industry required legally binding guidelines which were adequately legislated.

¹⁶⁶ DP Strachan "An Evaluation of the Self-Regulation of Promotional Competitions in South Africa" (2016) 19 (1) *Potchefstroom Electronic Law Journal* 3. Self-regulation is a form of regulation where an industry regulates itself, government does not have a role in this form of regulation. The previous position under the National Credit Act was similar to self-regulation as credit providers were not bound to government regulation and were free to develop their own evaluative mechanisms and procedures.

¹⁶⁷ Section 81 (4) (b). JW Scholtz...et al *Guide to the National Credit Act* (2008) 11.5.6.

¹⁶⁸ JW Scholtz...et al *Guide to the National Credit Act* (2008) 11.5.6.

¹⁶⁹ JW Scholtz...et al *Guide to the National Credit Act* (2008) 11.5.6. *Horwood* at para 5: "The requirement of s 81(2) of the NCA is that the credit provider takes 'reasonable steps to assess' the matters referred to in that section before entering into the credit agreement. S 82(1) permits a credit grantor to... determine for itself the evaluative mechanisms or models and procedures to be used in meeting its assessment obligations under section 81, provided that any such mechanism, model or procedure results in a fair and reasonable assessment. The credit provider must accordingly take reasonable steps to assess the relevant matters and the mechanisms, models and procedures used by it must result in a fair and objective assessment. Whether or not a credit grantor has taken the required reasonable steps to meet its assessment obligations is in the light of the wording of these provisions to be determined objectively on the facts and circumstances of any given case."

2.3.4 National Treasury and BASA Concerned About Reckless Lending Practices

In 2012, National Treasury and the BASA expressed their concern about the high levels of reckless lending in South Africa.¹⁷⁰ Statistics were obtained from the South African Reserve Bank which indicated that many South Africans were over indebted, and it was concerning that loans were made available to consumers who could not afford such credit.¹⁷¹ The statistics illustrated that household debt to disposable income was 76.3% during the second quarter of 2012.¹⁷² BASA and National Treasury agreed that some form of mechanism was required to perform pre-agreement assessments, with an aim to resolve the issue of reckless lending.¹⁷³

Furthermore, it was concerning that besides reckless lending practices, credit providers were abusing debt collection mechanisms.¹⁷⁴ It was well understood between National Treasury and BASA that to enable the functioning of a healthy economy, effective measures needed to be imposed. Both parties agreed that there must be minimum standards to determine affordability of a consumer, which was mandatory for credit providers.

Thus, the idea of introducing affordability assessment guidelines into law and the subsequent amendment to the NCA was decided.¹⁷⁵ Moreover, BASA agreed that its

¹⁷⁰ “Joint statement by the Minister of Finance and the chairperson of the Banking Association of South Africa” *National Treasury* available at http://www.treasury.gov.za/comm_media/press/2012/2012110101.pdf, accessed on 16 August 2017 at 1.

¹⁷¹ “Joint statement by the Minister of Finance and the chairperson of the Banking Association of South Africa” *National Treasury* available at http://www.treasury.gov.za/comm_media/press/2012/2012110101.pdf, accessed on 16 August 2017 at 1.

¹⁷² “Joint statement by the Minister of Finance and the chairperson of the Banking Association of South Africa” *National Treasury* available at http://www.treasury.gov.za/comm_media/press/2012/2012110101.pdf, accessed on 16 August 2017 at 1.

¹⁷³ “Joint statement by the Minister of Finance and the chairperson of the Banking Association of South Africa” *National Treasury* available at http://www.treasury.gov.za/comm_media/press/2012/2012110101.pdf, accessed on 16 August 2017 at 3.

¹⁷⁴ “Joint statement by the Minister of Finance and the chairperson of the Banking Association of South Africa” *National Treasury* available at http://www.treasury.gov.za/comm_media/press/2012/2012110101.pdf, accessed on 16 August 2017 at 3.

¹⁷⁵ “Gordhan and BASA agree to improve responsible lending practices” *Politicsweb* available at <http://www.politicsweb.co.za/documents/gordhan-and-basa-agree-to-improve-responsible-lend>, accessed on 27 April 2017.

members would not utilise EAOs, owing to the issues prevalent in the system.¹⁷⁶ It is submitted that the decisions made by BASA and National Treasury would have been to the detriment of unscrupulous credit providers and debt collectors.

2.3.5 The Link Between Reckless Credit and EAOs

To illustrate the severity of the problem of over-indebtedness and the prevalence of reckless credit in South Africa, follow up research conducted by the University of Pretoria into EAOs makes an interesting point about reckless credit.¹⁷⁷ The research revealed that there were multiple EAO deductions against the salaries of consumers.¹⁷⁸ Upon further investigation, credit checks and affordability assessments attributed this to reckless lending practices.¹⁷⁹ Researchers found that credit providers were least interested in the credit history of the consumers and were far more concerned about employment status; this is because it would become easier to secure an EAO upon default.¹⁸⁰

These statistics and research conducted by the University of Pretoria supports the assertion that there is a link between reckless credit and EAOs. It must be borne in mind that reckless credit is the foundation of the problem, thus resulting in an EAO. The link is essentially created when an unscrupulous credit provider enters into a reckless credit agreement with a consumer, thus the eventual culmination of an EAO becomes highly probable. Furthermore, it creates a state of over-indebtedness as a consumer could not necessarily afford the repayments on the credit agreement.

¹⁷⁶ “Joint statement by the Minister of Finance and the chairperson of the Banking Association of South Africa” *National Treasury* available at http://www.treasury.gov.za/comm_media/press/2012/2012110101.pdf, accessed on 16 August 2017 at 3.

¹⁷⁷ “The incidence of and undesirable practices relating to “garnishee orders” – a follow up report” *University of Pretoria* available at <http://archivedpublicwebsite.up.ac.za/sitefiles/file/47/327/2013%20garnishee%20orders%20follow%20up%20report.pdf>, accessed on 17 August 2017.

¹⁷⁸ “The incidence of and undesirable practices relating to “garnishee orders” – a follow up report” *University of Pretoria* available at <http://archivedpublicwebsite.up.ac.za/sitefiles/file/47/327/2013%20garnishee%20orders%20follow%20up%20report.pdf>, accessed on 17 August 2017 at 55.

¹⁷⁹ “The incidence of and undesirable practices relating to “garnishee orders” – a follow up report” *University of Pretoria* available at <http://archivedpublicwebsite.up.ac.za/sitefiles/file/47/327/2013%20garnishee%20orders%20follow%20up%20report.pdf>, accessed on 17 August 2017 at 56.

¹⁸⁰ “The incidence of and undesirable practices relating to “garnishee orders” – a follow up report” *University of Pretoria* available at <http://archivedpublicwebsite.up.ac.za/sitefiles/file/47/327/2013%20garnishee%20orders%20follow%20up%20report.pdf>, accessed on 17 August 2017 at 56.

2.3.6 Initial Affordability Assessment Guidelines

The Affordability Assessment Guidelines were the product of the objective of National Treasury and BASA to reduce reckless lending practices and thus encourage responsible borrowing practices.¹⁸¹ In order to achieve this objective, the NCR published draft guidelines in May 2013, with the aim in mind of eventually making it part of the NCA.¹⁸² The Affordability Assessment Guidelines are guidelines which credit providers must adhere to when conducting a pre-agreement assessment.¹⁸³ The mechanisms and procedures as outlined in the guidelines aims to achieve conformity in the credit industry and to monitor credit providers' activities.¹⁸⁴

The NCR published these guidelines with the following propositions:

- "Credit applicants prove their claimed discretionary income when it is above the norm for a person with their gross income and that such norms be determined as a percentage of gross income bands;
- Credit providers consider all the credit applicant's income, expenses and debt repayments when doing an affordability assessment;
- Credit providers refrain from lending to the maximum of the consumers' discretionary income and leave a margin of at least 25% of their discretionary income for adverse changes in the economy or the consumer's circumstances;
- That credit providers use the credit applicant's current credit information as stored on one or more credit bureaux;
- Credit providers process applications for credit within seven days from accessing an applicant's credit information as stored on credit bureaux; and
- Credit providers share credit application information on credit bureaux to allow for better affordability assessments to be made by other credit providers and to reduce credit application fraud."¹⁸⁵

Following the above, the Affordability Assessment Guidelines were published in September 2013. Scholtz submits that these guidelines were better than what was

¹⁸¹ JW Scholtz...et al *Guide to the National Credit Act* (2008) 11.5.6.

¹⁸² JW Scholtz...et al *Guide to the National Credit Act* (2008) 11.5.6.

¹⁸³ S Monty "Affordability assessment regulations: consumer law / NCA" (2014) 14 (9) *Without Prejudice* 29

¹⁸⁴ S Monty "Affordability assessment regulations: consumer law / NCA" (2014) 14 (9) *Without Prejudice* 29

¹⁸⁵ "National Credit Regulator" *Mail and Guardian* available at <https://mg.co.za/notice/2013-06-04-national-credit-regulator>, accessed on 5 May 2017. "Public Notices" *National Credit Regulator* available at <http://www.ncr.org.za/index.php/article>, accessed on 28 November 2017.

initially published, which was probably due to the fact that the public was permitted to comment on the June guidelines.¹⁸⁶ These guidelines were mainly published to provide a framework in which credit providers could conduct objective assessments of consumers.¹⁸⁷ It also envisaged reducing reckless lending practices and over-indebtedness.¹⁸⁸ In order to assist credit providers in making a fair pre-agreement assessment, the guidelines required a credit provider to reasonably assess the consumer's allocatable¹⁸⁹ income and discretionary income,¹⁹⁰ to determine whether or not the consumer could afford to repay the installments.¹⁹¹

In September 2013, pursuant to the June guidelines, further guidelines were published which aimed to ensure that credit providers conduct a thorough assessment and not only have regard for risk of default.¹⁹² In order to give effect to section 81 and assist credit providers in conducting an assessment to take reasonable steps to assess credit worthiness, these guidelines provide calculation standards for credit providers.¹⁹³

Moreover, the documents which a consumer submits must be verified such as bank statements and/or pay slips, in addition to that the credit provider can also obtain other verifiable information in order to validate the consumer's income.¹⁹⁴ In assessing discretionary and allocatable income, the credit provider needs to take into account

¹⁸⁶ JW Scholtz...et al *Guide to the National Credit Act* (2008) 11.5.6.

¹⁸⁷ M Kelly-Louw "The 2014 credit information amnesty regulations: what do they really entail?" (2015) 48 (1) *De Jure* 95.

¹⁸⁸ M Kelly-Louw "The 2014 credit information amnesty regulations: what do they really entail?" (2015) 48 (1) *De Jure* 95.

¹⁸⁹ Gross income subtract statutory deductions and necessary expenses.

¹⁹⁰ Gross income subtract statutory deductions, necessary expenses and other credit obligations as reflected on the consumer's credit record.

¹⁹¹ JW Scholtz...et al *Guide to the National Credit Act* (2008) 11.5.6.

¹⁹² C van Heerden and S Renke "Perspectives on the South African Responsible Lending Regime and the Duty to Conduct Pre-Agreement Assessment as a Responsible Lending Practice" (2015) *UPSpace* available at http://repository.up.ac.za/bitstream/handle/2263/45344/VanHeerden_Perspectives_2015.pdf;sequence=1, accessed on 5 May 2017 at 14. Letter to CBA.pdf. *Compuscan* available at <https://www.compuscan.co.za/downloads/Letter%20to%20CBA.pdf>, accessed on 28 November 2017.

¹⁹³ C van Heerden and S Renke "Perspectives on the South African Responsible Lending Regime and the Duty to Conduct Pre-Agreement Assessment as a Responsible Lending Practice" (2015) *UPSpace* available at http://repository.up.ac.za/bitstream/handle/2263/45344/VanHeerden_Perspectives_2015.pdf;sequence=1, accessed on 5 May 2017 at 14

¹⁹⁴ C van Heerden and S Renke "Perspectives on the South African Responsible Lending Regime and the Duty to Conduct Pre-Agreement Assessment as a Responsible Lending Practice" (2015) *UPSpace* available at http://repository.up.ac.za/bitstream/handle/2263/45344/VanHeerden_Perspectives_2015.pdf;sequence=1, accessed on 5 May 2017 at 15.

the existing debt obligations that the consumer has on their credit record; this is in line with the objective to curtail over-indebtedness.¹⁹⁵

In order to amend the NCA, draft regulations were published in 2014.¹⁹⁶ These draft regulations provide a minimum threshold for credit providers to comply with when undertaking to complete a pre-agreement assessment.¹⁹⁷ As per the regulations, it is mandatory for a consumer to submit accurate and truthful information for the purpose of the credit provider conducting a pre-agreement assessment.¹⁹⁸ Furthermore, maintenance obligations must be taken into account when calculating allocatable and discretionary income.¹⁹⁹

2.3.7 Amendment to the National Credit Act Pertaining to Reckless Lending

The National Credit Amendment Act No. 19 of 2014 came into operation on 13 March 2015. This amendment is in line with the joint statement issued by National Treasury and BASA, to curtail reckless lending practices and over-indebtedness of consumers.²⁰⁰

As alluded to, prior to the 2014 Amendment, credit providers were given an unlimited amount of freedom to determine their own evaluative mechanisms and procedures, when conducting a pre-agreement assessment. The legislative provision which effectively allowed for this loophole was section 82 (3) of the NCA, which provided that if any guidelines were to be published, it would not be binding on the credit provider. In the absence of a legal framework to conduct pre-agreement assessments, reckless lending practices increased thus leading to significant levels of over-indebtedness.²⁰¹

¹⁹⁵ C van Heerden and S Renke "Perspectives on the South African Responsible Lending Regime and the Duty to Conduct Pre-Agreement Assessment as a Responsible Lending Practice" (2015) *UPSpace* available at http://repository.up.ac.za/bitstream/handle/2263/45344/VanHeerden_Perspectives_2015.pdf;sequence=1, accessed on 5 May 2017 at 16.

¹⁹⁶ "The DTI Publishes Affordability Assessment Regulations for Public Comment" *The DTI* available at <https://www.thedti.gov.za/editmedia.jsp?id=3104>, accessed on 19 August 2017.

¹⁹⁷ JW Scholtz...et al *Guide to the National Credit Act* (2008) 11.5.6.

¹⁹⁸ Regulation 23.

¹⁹⁹ Regulation 23.

²⁰⁰ "Joint statement by the Minister of Finance and the chairperson of the Banking Association of South Africa" *National Treasury* available at http://www.treasury.gov.za/comm_media/press/2012/2012110101.pdf, accessed on 16 August 2017.

²⁰¹ "Joint statement by the Minister of Finance and the chairperson of the Banking Association of South Africa" *National Treasury* available at http://www.treasury.gov.za/comm_media/press/2012/2012110101.pdf, accessed on 16 August 2017 at 3.

To create conformity within the credit industry, the NCA has been amended to provide that a credit provider may still determine its own evaluative mechanisms and procedures, provided it results in a fair and objective assessment; however, it may not be inconsistent with the Affordability Assessment Guidelines.²⁰² The guidelines are criterion for credit providers when conducting pre-agreement assessments.²⁰³

The amendment of the NCA required the Minister to issue the criteria, to enable credit providers to conduct pre-agreement assessments in a conformed manner.²⁰⁴ To fulfil this statutory obligation, the final Affordability Assessment Guidelines were published. This is a positive step on the part of the legislature as there is now conformity in the credit industry. Moreover, it is submitted that this would now lead to a better quality of pre-agreement assessments and more care would now have to be exercised. The justification for this proposition is that there is a legally binding framework which credit providers must adhere to.

With the amendments to the NCA, section 48 was amended to allow for the Minister to publish the Affordability Assessment Guidelines. The amendment has deleted section 82 (3)²⁰⁵ and (4)²⁰⁶ of the NCA, which were rather problematic sections and gave credit providers unlimited freedom. This is significant because it entrenches the importance of ensuring conformity in the credit industry with regards to pre-agreement assessment models and mechanisms. Furthermore, it curtails the freedom which credit providers enjoyed and now seeks to ensure that pre-agreement assessments are conducted effectively. As previously alluded to, this is also important from a perspective of government policy and the agreement between the BASA and National Treasury.

²⁰² Section 82 (1) of the NCA amended by section 24 (a) of the NCA Amendment Act No 19 of 2014.

²⁰³ JM Otto *The National Credit Act Explained* 3 ed. (2013) 89. The Affordability Assessment Guidelines came into operation on 13 September 2015.

²⁰⁴ Section 48 of NCA.

²⁰⁵ Subject to subsections (2) (a) and (4), a guideline published by the National Credit Regulator is not binding on a credit provider.

²⁰⁶ If the Tribunal finds that a credit provider has repeatedly failed to meet its obligations under section 81, or customarily uses evaluative mechanisms, models or procedures that do not result in a fair and objective assessment, the Tribunal, on 30 application by the National Credit Regulator, may require that credit provider to -
(a) apply any guidelines published by the National Credit Regulator in terms of subsection (2)(b); or
(b) apply any alternative guidelines consistent with prevailing industry practice, as determined by the Tribunal.

To illustrate the workings of the amendment, in *National Credit Regulator v Shoprite Investments Ltd*,²⁰⁷ Shoprite determined its own evaluative mechanisms and models for pre-agreement assessments. The National Consumer Tribunal thus had to determine whether it resulted in fair and objective assessments. In assessing affordability, Shoprite relied on the existence of marriage; consumers' spouse's income; and various forms of disability grant.²⁰⁸ In engaging in reckless lending practices, Shoprite did not take the requisite care to verify the information pertaining to the consumers' income and took into account irrelevant factors which would influence the consumers' income.²⁰⁹

The NCR found that this was insufficient and the incorrect approach to adopt. The judgement further cautioned against credit providers assuming vital information, the NCA requires credit providers to instead verify the source of income.²¹⁰ This case is an example of credit providers not applying their minds correctly to reach an equitable outcome. Thus, Shoprite was fined for reckless lending by the NCR, where it was found that the credit provider failed to conduct affordability assessments properly.

2.3.8 Effectiveness of the NCA Amendment

To illustrate the effectiveness of the amendments, Moneyweb²¹¹ conducted research into the retail sector where consumers apply for credit.²¹² The research illustrated that Foschini²¹³ saw a 30% decrease in new store cards. On the other hand, Truworths²¹⁴ reported a decrease from 30% to 24%, resulting in a R200 to R250 million estimate in the loss of credit sales. This is indicative of the stringent measures now introduced by the amendment to the NCA and the Affordability Assessment Guidelines. While South Africa has a significant credit market, this decrease should be viewed in a positive light

²⁰⁷ (NCT/32946/2015/140(1)) [2017] ZANCT 98 (5 September 2017).

²⁰⁸ Para 58.

²⁰⁹ Para 73.

²¹⁰ Para 74.

²¹¹ Moneyweb is an online news service, providing business, financial and investment news.

²¹² "Credit sales slump: The new normal for fashion retailers" *Moneyweb* available at <https://www.moneyweb.co.za/news/companies-and-deals/credit-sales-slump-the-new-normal-for-fashion-retailers/>, accessed on 18 March 2017. Moneyweb investigated major fashion retailers who sell a significant amount of clothing on credit to customers, after the Affordability Assessment Guidelines and 2015 NCA amendment came into effect. Foschini noted a 30% decrease relating to new store cards. On the other hand, Truworths noted a decrease from 30% to 24% in new store cards and estimated a R200 – 250 million in loss of credit sales.

²¹³ A large chain retail store.

²¹⁴ A large chain retail store.

as it indicates the success of the affordability assessment guidelines and NCA amendment.

Apart from the retail sector, the NCR Annual Report for 2015/2016 illustrates that as at March 2016: 84.96 million consumer accounts existed at credit bureaus. 65.03 million (76.5%) of consumers were in good standing, however, 19.92 million (23.5%) of consumers had impaired records.²¹⁵ It appears from the retail sector and NCR data that the amendments have resulted in healthy credit records. From these two sets of data, it can be inferred that the amendments pertaining to reckless lending has allowed for the NCA to achieve its mandate.

It remains unclear whether the amendments to the NCA have resulted in a reduction of EAOs. To ensure that the NCA continuously achieves its mandate to reduce reckless lending, the NCR and other stakeholders must ensure that credit providers adhere to the credit laws and enforce the necessary penalties and sanctions against unscrupulous credit providers.

2.3.9 Conclusion

It appears from the above that the legislature has made it more difficult for consumers to now obtain credit than was initially the case when the NCA was first promulgated. This is because previously the NCA contained shortcomings pertaining to the way pre-agreement assessments were conducted. It is commendable that the government has recognised this issue and sought to rectify it.

2.4 The Inclusion of External Market Factors in the NCA

2.4.1 Introduction

In this context, an external market factor refers to those factors which consumers have no control over such as changes in the global economy. These factors will negatively impact upon consumers especially when they are in a state of over-indebtedness, as repaying debt obligations may seemingly become more difficult.²¹⁶ External market factors are relevant to reckless credit because its inclusion in a pre-agreement

²¹⁵ "Annual Report 2015/2016" *National Credit Regulator* available at <https://www.ncr.org.za/documents/pages/Annual%20Reports/NCR%20Annual%20Report%202015-16.pdf>, accessed on 19 January 2018.

²¹⁶ S De Wet... et al "Measuring the effect of the national credit act on indebtedness in South Africa" (2015) 8 (1) *Journal of Economic and Financial Sciences* 84.

assessment would improve the quality of credit granted and thus, curtail reckless lending and prevent over-indebtedness. Moreover, the incorporation of this factor will assist in ensuring sufficient income is set aside for a consumer if South Africa faces further economic downgrades.²¹⁷

2.4.2 South Africa's Volatile Economy

South Africa has a volatile economy, which is influenced heavily by political and socio-economic factors;²¹⁸ labour unrest in the country also has a negative effect on growth and the achievement of fiscal goals.²¹⁹ Furthermore, external market factors such as unemployment, interest rate fluctuations and slow growth of the economy can negatively influence the financial affairs of South Africans.²²⁰

It is submitted that external market factors are relevant to South African credit law and provision needs to be made for this when a credit provider conducts a pre-agreement assessment. This is to ensure that credit providers will be aware of external market factors that can have ramifications on a consumer's salary, thus plunging them further into debt and over-indebtedness. Furthermore, it is submitted that if South African credit law does not make provision for the inclusion of external market factors into pre-agreement assessments, consumers may then find themselves in a further state of

²¹⁷ While economic factors are contributors to reckless credit, it is submitted that once these materialise, a consumer will be unable to escape the debt trap. Once a consumer has been embroiled into such a debt trap, an EAO becomes inevitable. If one were to consider current events involving South Africa's downgrading to junk status by Standard and Poor (Who We Are S&P Global Ratings http://www.spratings.com/en_US/what-we-do. (Accessed: 28 November 2017)) this will have a direct bearing on consumers who apply for credit. Now that South Africa has been downgraded to junk status, interest rates will increase and thus the cost of credit will be more expensive. Furthermore, this economic factor will also contribute to poverty and unemployment. While consumers may already be victims of reckless lending, certain sectors of the population may find themselves further embroiled in the debt trap as repayments on credit agreements become more difficult. In the current situation, South Africans may find themselves in a state of over-indebtedness and easily default; this could well make an EAO imminent in the debt collection process. "Infographic: How credit ratings work and how junk status will affect you" *Business Tech* available at <https://businesstech.co.za/news/banking/168045/infographic-how-credit-ratings-work-and-how-junk-status-will-affect-you/>, accessed on 5 April 2017. "Why we're now junk: Read the full S&P statement on SA's credit rating" *Eyewitness News* available at <http://ewn.co.za/2017/04/03/read-the-full-standard-and-poors-statement-south-africa-credit-rating-junk-status>, accessed on 12 May 2017.

²¹⁸ J H Mostert, S J Steel and F J Mostert "Importance of External Environmental Labour Related Risk Factors for Financial Investment Decision-Making" (2002) 5 (3) *South African Journal of Economic and Management Sciences* 649.

²¹⁹ I Salgado "Nigeria and South Africa - conflict in Africa's two biggest economies: monitoring economies" (2014) *Africa Conflict Monthly Monitor* 18.

²²⁰ S De Wet... et al "Measuring the effect of the national credit act on indebtedness in South Africa" (2015) 8 (1) *Journal of Economic and Financial Sciences* 86.

over-indebtedness, thus eventually culminating in an EAO owing to their inability to satisfy their debt obligations.

2.4.3 The Inclusion of External Market Factors into Pre-Agreement Assessments

In a study surrounding the effectiveness of the NCA in reducing household debt, it was observed that, unsecured lending has risen since the advent of the NCA as banks have found ways to avoid the seemingly strict laws surrounding the granting of credit.²²¹ Although the NCA seeks to curb reckless lending, measures must be in place which seek to ensure that consumers are protected from credit providers who wish to circumvent the NCA.²²²

A criticism of the NCA and measures to prevent over-indebtedness has been that the discretionary income component does not consider external market factors, such as interest rate fluctuations amongst others.²²³ This is important because the NCA's drafters probably did not consider the economic reality that South Africans endure. As previously alluded to, it is submitted that the junk status may further contribute to over-indebtedness.

From an economic perspective, if consumers discretionary income is severely affected by the happening of an external economic factor, they will find themselves in a state of over-indebtedness as honouring debt obligations will become difficult.²²⁴ In terms of discretionary income, this will be compromised if a consumer already has a debt portfolio indicating over-indebtedness.²²⁵ If an external market factor were to occur such as recession or in the current state of South African events, downgrading to junk status, a consumer's discretionary income will be affected as a consumer's ability to fulfil their debt obligations will be compromised.²²⁶

²²¹ A Bimha "Effectiveness of the National Credit Act of South Africa in Reducing Household Debt" (2014) 3 (4) *Journal of Governance and Regulation* 171.

²²² A Bimha "Effectiveness of the National Credit Act of South Africa in Reducing Household Debt" (2014) 3 (4) *Journal of Governance and Regulation* 171.

²²³ S De Wet... et al "Measuring the effect of the national credit act on indebtedness in South Africa" (2015) 8 (1) *Journal of Economic and Financial Sciences* 88.

²²⁴ S De Wet... et al "Measuring the effect of the national credit act on indebtedness in South Africa" (2015) 8 (1) *Journal of Economic and Financial Sciences* 89.

²²⁵ S De Wet... et al "Measuring the effect of the national credit act on indebtedness in South Africa" (2015) 8 (1) *Journal of Economic and Financial Sciences* 92.

²²⁶ S De Wet... et al "Measuring the effect of the national credit act on indebtedness in South Africa" (2015) 8 (1) *Journal of Economic and Financial Sciences* 92. R Stuart and P Black "External Shocks, Financial Markets and the Real Economy - Policy Options in South Africa" (2000) 3(3) *South African Journal of Economic and Management Sciences* 408.

The issue of consumers applying for multiple loans to meet their current debt obligations has been contagious in South Africa.²²⁷ Upon examination of the issue surrounding consumers who were granted second loans to pay off their initial loan, African Bank were found to be engaging in reckless lending.²²⁸ This is not only problematic from an affordability perspective, however, this also stems from economic ramifications.²²⁹ When market conditions are favourable, consumers have more income available to spend, thus a significant portion goes towards debt.²³⁰ When consumers are compelled to take out further loans to ensure payment towards the initial loan, this may not necessarily be due to a market factor such as the prime rate; instead, it is due to their inability to fulfil their initial debt obligations.²³¹

While statistics are released from the NCR²³² depicting the state of the credit market, the research conducted by De Wet and co-authors provides a fresh perspective on the state of the credit market. While preventing reckless lending is a key purpose of the NCA, the authors found that if an external market factor were to occur, consumers would find themselves over indebted.²³³ Apart from academic debate surrounding the effectiveness of the NCA, an economic perspective reveals that the NCA has not quite fulfilled its purpose.²³⁴ It is submitted that the affordability assessments which credit

²²⁷“Evidence of reckless lending by African Bank?” *Moneyweb* available at <https://www.moneyweb.co.za/uncategorized/evidence-of-reckless-lending-by-african-bank/>, accessed on 12 May 2017.

²²⁸ “Evidence of reckless lending by African Bank?” *Moneyweb* available at <https://www.moneyweb.co.za/uncategorized/evidence-of-reckless-lending-by-african-bank/>, accessed on 12 May 2017.

²²⁹ S De Wet... et al “Measuring the effect of the national credit act on indebtedness in South Africa” (2015) 8 (1) *Journal of Economic and Financial Sciences* 97. C Harmse “Are South Africans drowning in debt or are favourable turning points emerging?” (2009) *Professional Accountant* 11.

²³⁰ S De Wet... et al “Measuring the effect of the national credit act on indebtedness in South Africa” (2015) 8 (1) *Journal of Economic and Financial Sciences* 97. G Jacobs and EM Smit “Materialism and Indebtedness of Low Income Consumers: Evidence From South Africa's Largest Credit Granting Catalogue Retailer” (2010) 41 (4) *South African Journal of Business Management* 18.

²³¹ S De Wet... et al “Measuring the effect of the national credit act on indebtedness in South Africa” (2015) 8 (1) *Journal of Economic and Financial Sciences* 97.

²³² “National Credit Regulator” *National Credit Regulator* available at <http://www.ncr.org.za/>, accessed on 2 September 2017.

²³³ S De Wet... et al “Measuring the effect of the national credit act on indebtedness in South Africa” (2015) 8 (1) *Journal of Economic and Financial Sciences* 100. K Paile *The Impact of the National Credit Act on Household Debt Levels in South Africa* (Masters thesis, University of Witwatersrand, 2013).

²³⁴ S De Wet... et al “Measuring the effect of the national credit act on indebtedness in South Africa” (2015) 8 (1) *Journal of Economic and Financial Sciences* 100. G Jacobs and EM Smit “Materialism and Indebtedness of Low Income Consumers: Evidence From South Africa's Largest Credit Granting Catalogue Retailer” (2010) 41 (4) *South African Journal of Business Management* 18.

providers conduct are insufficient are do not quite provide adequate protection against reckless lending and subsequent over-indebtedness.²³⁵

2.4.4 Implementation of External Market Factors into Pre-Agreement Assessments

To incorporate external market factors in South African credit law, the legislature must make provision for external market factors in an affordability assessment.

For example: if a low-income earner approaches a credit provider and is employed as a miner at a mining company, the credit provider ought to consider the volatility of the industry and that in some instances retrenchment is possible. Furthermore, a vital consideration is the fact that the industry faces a significant amount of protest action, which could negatively impact the salary of the consumer and overall performance. Moreover, if a consumer is unemployed, it could invariably lead to poverty thus culminating in a reduced monetary flow to the consumer.²³⁶

It is submitted that the external market factors must be objectively assessed and in principle, it should be something that must be mandatory when conducting a pre-agreement assessment. Moreover, this analysis must be conducted by a highly competent individual such as an actuarial scientist, including economics, finance and legal professionals. Currently, South Africa has encountered a stumbling block in its financial market. Rating agency Standard and Poor²³⁷ downgraded South Africa to junk status.²³⁸ It is submitted that this will have a significant effect on consumers who are currently over-indebted because consumers who are currently over-indebted due to reckless lending practices may find it difficult to furnish their debt obligations.

When considering which factors are relevant in considering for the affordability assessment, government must consult together with the relevant stakeholders such as the NCR, credit providers, consumer protection experts, actuaries, lawyers and

²³⁵ S Muhanji and K Ojah "Management and Sustainability of External Debt: A Focus on the Emerging Economies of Africa" (2011) *Review of Development Finance* 185.

²³⁶ H Combrink and J Venter "The Influence of Employment and Occupation on a Household's Net Equity" (2016) 9 (3) *Journal of Economic and Financial Sciences* 730.

²³⁷ Standard and Poor is a global rating agency, which furnishes credit ratings across a broad spectrum of industries such as government, the corporate sector and financial services sector. "Who We Are" *S&P Global Ratings* available at http://www.spratings.com/en_US/what-we-do, accessed on 28 November 2017.

²³⁸ "Why we're now junk: Read the full S&P statement on SA's credit rating" *Eyewitness News* available at <http://ewn.co.za/2017/04/03/read-the-full-standard-and-poors-statement-south-africa-credit-rating-junk-status>, accessed on 12 May 2017.

economists. This advice would be crucial as the government would have to ensure a policy change is successfully implemented. As alluded to, factors such as interest rates, property prices and unemployment amongst others should be included in the affordability assessments and if further advice is sought from relevant stakeholders then it would be possible that more suggestions would be put forward.

2.4.5 Conclusion

To enhance the quality of credit granted, the government must make provision for binding legislation to be enacted, which would make it mandatory for credit providers to include external market factors into pre-agreement assessments. This inclusion will assist the consumer credit market in reducing the levels of over-indebtedness due to reckless lending practices.

2.5 Conclusion

While credit is fundamental to society, it is essential that for a healthy and functioning credit market that credit is granted in a responsible manner.

The Affordability Assessment Guidelines were introduced with an underlying aim to reduce reckless lending. There also appears to be a balancing act as indicated in *Mbatha* with the pre-agreement assessment now seemingly more onerous on both credit providers and consumers. As the credit market is large in South Africa, the amendment to the NCA and Affordability Assessment Guidelines must be adhered to. While it has been argued that these mechanisms are not sufficient, policy makers and all relevant stakeholders need to make every attempt to introduce the likelihood of external economic factors into the pre-agreement assessment. This will ensure that legislation is in line with economic realities and that consumer rights are protected from events neither they nor credit providers have control over. As a young democracy, South Africa has a volatile political and economic climate; in reducing consumer indebtedness, the legislature must intervene and introduce measures to possibly allow for a portion of the consumer's salary to be set aside to include unlikely economic events.

The next chapter will focus on how the current pre-agreement assessments and prevalence of reckless lending have an impact on EAOs. The chapter will examine whether a link exists between reckless lending and EAOs and explore how the process is flawed from the beginning. Furthermore, it will illustrate how the tick box mentality to pre-agreement assessments flaws the entire process and seemingly links reckless credit to EAOs.

Chapter 3

Does A Link Exist Between Reckless Credit and EAOs?

3.1 Introduction

Credit is fundamental to any society, it enables consumers to purchase goods and access services. However, credit must be granted responsibly and within the parameters of South African law and the common law to safeguard the consumer and credit provider. Issues arise when unscrupulous credit providers grant credit in a reckless manner, thus beginning an ensuing process of debt collection which likely culminates in an EAO.²³⁹

South Africa's socio-economic landscape is indicative of a society encompassing poverty, low levels of education and inequality.²⁴⁰ This is due to past inequalities and the issues which South Africa faces post-Apartheid.²⁴¹ In the credit and debt collection process, one of the problems prevalent is financial illiteracy and ignorance of the law.²⁴² This is not only an issue facing low income earners, it is one which also affects consumers of all income brackets.²⁴³ It is submitted that this problem is relevant because unscrupulous credit providers and those involved in the debt collection process take undue advantage of these factors.²⁴⁴

²³⁹ *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others; Association of Debt Recovery Agents NPC v University of Stellenbosch Legal Aid Clinic and Others; Mavava Trading 279 (Pty) Ltd and Others v University of Stellenbosch Legal Aid Clinic and Others* (CCT127/15) [2016] ZACC 32; 2016 (6) SA 596 (CC); (2016) 37 ILJ 2730 (CC); 2016 (12) BCLR 1535 (CC) (13 September 2016). "The incidence of and undesirable practices relating to "garnishee orders" – a follow up report" *University of Pretoria* available at <http://archivedpublicwebsite.up.ac.za/sitefiles/file/47/327/2013%20garnishee%20orders%20follow%20up%20report.pdf>, accessed on 4 September 2017.

²⁴⁰ JD Triegaardt "Poverty and Inequality in South Africa: Policy Considerations in an Emerging Democracy" (2006) *Paper presented at the annual Association of South African Social Work Education Institutions* available at <http://www.dbsa.org/EN/About-Us/Publications/Documents/Poverty%20and%20inequality%20in%20South%20Africa%20Policy%20considerations%20in%20an%20emerging%20democracy.pdf>, accessed on 4 September 2017 at 2.

²⁴¹ JD Triegaardt "Poverty and Inequality in South Africa: Policy Considerations in an Emerging Democracy" (2006) *Paper presented at the annual Association of South African Social Work Education Institutions* available at <http://www.dbsa.org/EN/About-Us/Publications/Documents/Poverty%20and%20inequality%20in%20South%20Africa%20Policy%20considerations%20in%20an%20emerging%20democracy.pdf>, accessed on 4 September 2017 at 2.

²⁴² J Campbell "Restoring Rational Choice: The Challenge of Consumer Financial Regulation" (2016) *Sloan Foundation Economic Research Paper No. 2719330* 17.

²⁴³ J Campbell "Restoring Rational Choice: The Challenge of Consumer Financial Regulation" (2016) *Sloan Foundation Economic Research Paper No. 2719330* 17.

²⁴⁴ "The incidence of and undesirable practices relating to "garnishee orders" – a follow up report" *University of Pretoria* available at

As alluded to in chapter two, when conducting the pre-agreement assessment, credit providers do not always take the requisite care to conduct thorough and in-depth assessments.²⁴⁵ The University of Pretoria conducted research into the issues surrounding EAOs and found that credit facilities were extended to consumers who had a history of defaulting.²⁴⁶ Furthermore, when the consumers' financial situations were assessed, the credit should not have been granted.²⁴⁷ The research further found that credit providers were interested in consumers who were employed because their wage or salary was viewed as a form of security.²⁴⁸

A controversial factor that is deemed to contribute to reckless credit is a so-called tick box approach to granting credit; this means that credit providers do not properly apply themselves to the situation of each individual consumer. It is submitted that this leads to a situation where consumers with a job will be extended credit,²⁴⁹ in circumstances where the consumer should not have been granted the credit due to over-indebtedness.²⁵⁰

<http://archivedpublicwebsite.up.ac.za/sitefiles/file/47/327/2013%20garnishee%20orders%20follow%20up%20report.pdf>, accessed on 4 September 2017 at 56.

²⁴⁵ "The incidence of and undesirable practices relating to "garnishee orders" – a follow up report" *University of Pretoria* available at <http://archivedpublicwebsite.up.ac.za/sitefiles/file/47/327/2013%20garnishee%20orders%20follow%20up%20report.pdf>, accessed on 4 September 2017 at 56.

²⁴⁶ "The incidence of and undesirable practices relating to "garnishee orders" – a follow up report" *University of Pretoria* available at <http://archivedpublicwebsite.up.ac.za/sitefiles/file/47/327/2013%20garnishee%20orders%20follow%20up%20report.pdf>, accessed on 4 September 2017 at 56.

²⁴⁷ "The incidence of and undesirable practices relating to "garnishee orders" – a follow up report" *University of Pretoria* available at <http://archivedpublicwebsite.up.ac.za/sitefiles/file/47/327/2013%20garnishee%20orders%20follow%20up%20report.pdf>, accessed on 4 September 2017 at 56.

²⁴⁸ "The incidence of and undesirable practices relating to "garnishee orders" – a follow up report" *University of Pretoria* available at <http://archivedpublicwebsite.up.ac.za/sitefiles/file/47/327/2013%20garnishee%20orders%20follow%20up%20report.pdf>, accessed on 4 September 2017 at 56.

²⁴⁹ A consumer who is employed and receives a wage/salary will be deemed favourable to enter into a reckless credit agreement as their wage/salary is a form of security upon default when an EAO is granted.

²⁵⁰ "Treating Customers Fairly in the Financial Sector: a draft market conduct policy framework for South Africa" *National Treasury* available at <http://www.treasury.gov.za/public%20comments/FSR2014/Treating%20Customers%20Fairly%20in%20the%20Financial%20Sector%20Draft%20MCP%20Framework%20Amended%20Jan2015%20With%20Ap6.pdf>, accessed on 4 September 2017 at 44. R Rattue. "Ticking the box...down but not yet out." (2016) 3 (1) *MoneyMarketing* 11.

Invariably, default occurs in these reckless credit agreements.²⁵¹ The credit provider will then send a mandatory notice in terms of s129 of the NCA to demand that the default be remedied, to prevent further legal proceedings. If the s129 notice is ignored, the credit provider can then follow the legal process of issuing summons and then applying for judgement.²⁵² Typically, once judgement is obtained a creditor seeks to execute it. In most instances involving low incomes consumers in South Africa, the method of execution of judgement is the EAO process.²⁵³

This chapter will discuss how reckless credit impacts on the eventual culmination of an EAO. It will also seek to investigate the impact of the tick box approach on pre-agreement assessments. While there are no statistics to support the assertion that a link does indeed exist between reckless credit and EAOs, there is anecdotal evidence which suggests this link.²⁵⁴

3.2 The Role of Reckless Lending

²⁵¹ The 2015/2016 Annual Report from the National Credit Regulator revealed that fourteen credit bureaus which held credit records: there were 23.88 million credit consumers and 9.55 million consumers held impaired records." Annual Report 2015/2016" *The National Credit Regulator* available at <https://www.ncr.org.za/documents/pages/Annual%20Reports/NCR%20Annual%20Report%202015-16.pdf>, accessed on 27 September 2017.

²⁵² *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others; Association of Debt Recovery Agents NPC v University of Stellenbosch Legal Aid Clinic and Others; Mavava Trading 279 (Pty) Ltd and Others v University of Stellenbosch Legal Aid Clinic and Others* (CCT127/15) [2016] ZACC 32; 2016 (6) SA 596 (CC); (2016) 37 ILJ 2730 (CC); 2016 (12) BCLR 1535 (CC) (13 September 2016) at para 12.

²⁵³ "The incidence of and undesirable practices relating to "garnishee orders" – a follow up report" *University of Pretoria* available at <http://archivedpublicwebsite.up.ac.za/sitefiles/file/47/327/2013%20garnishee%20orders%20follow%20up%20report.pdf>, accessed on 4 September 2017 at 10. See *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others; Association of Debt Recovery Agents NPC v University of Stellenbosch Legal Aid Clinic and Others; Mavava Trading 279 (Pty) Ltd and Others v University of Stellenbosch Legal Aid Clinic and Others* (CCT127/15) [2016] ZACC 32; 2016 (6) SA 596 (CC); (2016) 37 ILJ 2730 (CC); 2016 (12) BCLR 1535 (CC) (13 September 2016) at para 36.

²⁵⁴ "The incidence of and undesirable practices relating to "garnishee orders" – a follow up report" *University of Pretoria* available at <http://archivedpublicwebsite.up.ac.za/sitefiles/file/47/327/2013%20garnishee%20orders%20follow%20up%20report.pdf>, accessed on 4 September 2017. *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice And Correctional Services and Others* (16703/14) [2015] ZAWCHC 99; 2015 (5) SA 221 (WCC); [2015] 3 All SA 644 (WCC); (2015) 36 ILJ 2558 (WCC) (8 July 2015). B Whittle "LSSA condemns unscrupulous garnishee practices" (2013) De Rebus 13.

3.2.1 Introduction

Most consumers do not have an in depth understanding of the workings of the financial sector.²⁵⁵ This is problematic and a factor which unscrupulous credit providers and stakeholders involved in the debt collection process take advantage of. In many instances, consumers harm their financial welfare and cannot rise above their circumstances to generate more wealth when they do not understand what financial products entail.²⁵⁶

3.2.2 Financial Ignorance

Campbell, in identifying the extent of financial ignorance concludes that there are five aspects to it, however, for the purposes of this paper the significant ones are: ignorance of financial concepts, contract terms and financial history.²⁵⁷ Ignorance of financial concepts is important as this means that consumers do not understand key financial terms which are essential to make an informed decision about a financial product.²⁵⁸

When consumers are given agreements by credit providers or other members of the financial industry, they do not necessarily comprehend the contents of the agreement.²⁵⁹ At times, pertinent information is not brought to the attention of the consumer and hidden in a shrewd manner in tiny font size. Consumers are also in a seemingly weaker position than the other contracting party (such as the credit provider) because they do not know how to assess fairness of a contract or negotiate terms.²⁶⁰ It is submitted that this leads to poor financial management and renders consumers incapable of adequately fulfilling their obligations under the financial agreement.²⁶¹

²⁵⁵ J Campbell "Restoring Rational Choice: The Challenge of Consumer Financial Regulation" (2016) *Sloan Foundation Economic Research Paper No. 2719330* 3.

²⁵⁶ J Campbell "Restoring Rational Choice: The Challenge of Consumer Financial Regulation" (2016) *Sloan Foundation Economic Research Paper No. 2719330* 3.

²⁵⁷ J Campbell "Restoring Rational Choice: The Challenge of Consumer Financial Regulation" (2016) *Sloan Foundation Economic Research Paper No. 2719330* 17.

²⁵⁸ J Campbell "Restoring Rational Choice: The Challenge of Consumer Financial Regulation" (2016) *Sloan Foundation Economic Research Paper No. 2719330* 17.

²⁵⁹ J Campbell "Restoring Rational Choice: The Challenge of Consumer Financial Regulation" (2016) *Sloan Foundation Economic Research Paper No. 2719330* 21.

²⁶⁰ J Campbell "Restoring Rational Choice: The Challenge of Consumer Financial Regulation" (2016) *Sloan Foundation Economic Research Paper No. 2719330* 21.

²⁶¹ Section 22 of the Consumer Protection Act requires that consumers receive information in plain and understandable language. While legislation specifically makes this mandatory, in practice, this has not

Moreover, consumers do not make use of the information that is available around them to assess the performance of a financial product.²⁶² Instead, consumers are likely to rely on their flawed perception and own experiences to determine the effectiveness of a financial product.²⁶³ This is an issue which contributes to poor financial decisions as consumers use their financial ignorance to determine financial affairs.

It is submitted that for consumers to be educated about their financial decisions, credit providers such as banks and other stakeholders need to embark upon education programmes. Such programmes need to educate consumers about key financial terms and concepts like interest, reckless credit and which administrative body can be approached for dispute resolution. An example of an initiative of this nature is the First National Bank (FNB) Be Financially Smart – Education Centre campaign.²⁶⁴ FNB has created videos on topics such as how to save, create budgets, insurance policies and bank accounts. Drawing from the FNB initiative, it is suggested that other credit providers embark on a similar programme where the primary objective is educating consumers about financial matters.

3.2.3 The Impact of Reckless Lending on EAO's

It has been argued that while reckless credit is a contentious issue in the EAO process, it is not the core problem surrounding EAOs.²⁶⁵ This is because the provisions of the NCA are not drafted well and do not provide adequate protection to consumers.²⁶⁶ These weak provisions of the NCA contribute to reckless lending and over-indebtedness.²⁶⁷ Furthermore, the NCR, debt collectors and consumers have not been proactive in holding unscrupulous credit providers accountable for their reckless

been properly implemented. E de Stadler and L van Zyl "Plain Language Contracts: Challenges and Opportunities" (2017) 29 (1) *SA Mercantile Law Journal* 96. To be discussed further below in 3.3.4.

²⁶² J Campbell "Restoring Rational Choice: The Challenge of Consumer Financial Regulation" (2016) *Sloan Foundation Economic Research Paper* No. 2719330 22.

²⁶³ J Campbell "Restoring Rational Choice: The Challenge of Consumer Financial Regulation" (2016) *Sloan Foundation Economic Research Paper* No. 2719330 22.

²⁶⁴ "Your First Steps Become Financially Smart" *First National Bank* available at <https://www.fnb.co.za/education/be-financially-smart.html>, accessed on 5 September 2017.

²⁶⁵ B Bentley "Separating the baby and the bath water - garnishee and emoluments attachment orders." (2013) 41 *De Rebus* available at <http://www.saflii.org/za/journals/DEREBUS/2013/41.html>, accessed on 5 September 2017.

²⁶⁶ B Bentley "Separating the baby and the bath water - garnishee and emoluments attachment orders." (2013) 41 *De Rebus* available at <http://www.saflii.org/za/journals/DEREBUS/2013/41.html>, accessed on 5 September 2017.

²⁶⁷ B Bentley "Separating the baby and the bath water - garnishee and emoluments attachment orders." (2013) 41 *De Rebus* available at <http://www.saflii.org/za/journals/DEREBUS/2013/41.html>, accessed on 5 September 2017.

lending practices.²⁶⁸ This argument is in line with the 2013 University of Pretoria research into EAOs where it was found that credit providers were extending credit facilities to consumers who could not afford the credit.²⁶⁹

While it is argued that consumers have not played a proactive role in holding unscrupulous credit providers accountable, a fact which must be borne in mind is that some consumers do not understand their own financial affairs. Furthermore, consumers who do not have the financial means to access lawyers are probably unaware of their rights under the NCA or appropriate action which could be taken against credit providers. Campbell's submissions about financial ignorance amongst other factors are consistent with Bentley's submissions because some consumers may not be aware that their credit agreements are inherently reckless.

3.2.4 The Tick Box Approach

An underlying problem in the pre-agreement assessment process, which is also prevalent in the broader financial services industry is the tick box approach to compliance.²⁷⁰ This conduct is defined as "denoting or relating to a procedure or process carried out purely to satisfy convention, rules, or regulations."²⁷¹ National Treasury has expressed its concern about this tick box mentality as credit providers were not conducting an in-depth risk analysis of the consumer.²⁷² Instead, it was

²⁶⁸ B Bentley "Separating the baby and the bath water - garnishee and emoluments attachment orders." (2013) 41 *De Rebus* available at <http://www.saflii.org/za/journals/DEREBUS/2013/41.html>, accessed on 5 September 2017.

²⁶⁹ "The incidence of and undesirable practices relating to "garnishee orders" – a follow up report" *University of Pretoria* available at <http://archivedpublicwebsite.up.ac.za/sitefiles/file/47/327/2013%20garnishee%20orders%20follow%20up%20report.pdf>, accessed on 4 September 2017 at 56.

²⁷⁰ "Treating Customers Fairly in the Financial Sector: a draft market conduct policy framework for South Africa" *National Treasury* available at <http://www.treasury.gov.za/public%20comments/FSR2014/Treating%20Customers%20Fairly%20in%20the%20Financial%20Sector%20Draft%20MCP%20Framework%20Amended%20Jan2015%20WithAp6.pdf>, accessed on 4 September 2017 at 12.

²⁷¹ "Tick Box" *English Oxford Living Dictionaries* available at https://en.oxforddictionaries.com/definition/tick_box, accessed on 5 September 2017.

²⁷² "Treating Customers Fairly in the Financial Sector: a draft market conduct policy framework for South Africa" *National Treasury* available at <http://www.treasury.gov.za/public%20comments/FSR2014/Treating%20Customers%20Fairly%20in%20the%20Financial%20Sector%20Draft%20MCP%20Framework%20Amended%20Jan2015%20WithAp6.pdf>, accessed on 4 September 2017 at 12.

merely used to satisfy the requirements of legislation, thus leading to detrimental consequences relating to the financial affairs of consumers.²⁷³

In order to move away from the tick box approach to compliance, National Treasury requires credit providers to conduct an in-depth analysis of the consumer and to effectively apply their minds.²⁷⁴ It is preferred that credit providers apply their minds rather than the tick box approach because the former will allow for a fair outcome which will ultimately serve the economy and consumer well.²⁷⁵ Furthermore, National Treasury believes that a tick box approach to compliance could lead to the detrimental consequence of excluding certain consumers from accessing financial services.²⁷⁶

Rattue argues that if the financial services industry became accustomed to the tick box approach, it would now have to adopt a “principle based” methodology to satisfy compliance requirements.²⁷⁷ This is in line with National’s Treasury’s objective of increasing consumer protection and ensuring that a fair and just outcome is achieved.²⁷⁸ It is submitted that if credit providers abolish the tick box approach to pre-agreement assessments, this would lead to the likely outcome of improving the quality

²⁷³ “Treating Customers Fairly in the Financial Sector: a draft market conduct policy framework for South Africa” *National Treasury* available at <http://www.treasury.gov.za/public%20comments/FSR2014/Treating%20Customers%20Fairly%20in%20the%20Financial%20Sector%20Draft%20MCP%20Framework%20Amended%20Jan2015%20WithAp6.pdf>, accessed on 4 September 2017 at 12.

B Elliot “Diversity Leads to Better Financial Results” (2017) 5 *HR Future* 33.

²⁷⁴ “Treating Customers Fairly in the Financial Sector: a draft market conduct policy framework for South Africa” *National Treasury* available at <http://www.treasury.gov.za/public%20comments/FSR2014/Treating%20Customers%20Fairly%20in%20the%20Financial%20Sector%20Draft%20MCP%20Framework%20Amended%20Jan2015%20WithAp6.pdf>, accessed on 4 September 2017 at 28.

²⁷⁵ “Treating Customers Fairly in the Financial Sector: a draft market conduct policy framework for South Africa” *National Treasury* available at <http://www.treasury.gov.za/public%20comments/FSR2014/Treating%20Customers%20Fairly%20in%20the%20Financial%20Sector%20Draft%20MCP%20Framework%20Amended%20Jan2015%20WithAp6.pdf>, accessed on 4 September 2017 at 28.

²⁷⁶ “A New Approach to Combat Money Laundering and Terrorist Financing” *National Treasury* available at <http://www.treasury.gov.za/legislation/regulations/FICA/A%20new%20approach%20to%20combat%20money%20laundering%20and%20terrorist%20financing.pdf>, accessed on 5 September 2017 at 5.

²⁷⁷ R Rattue. “Ticking the box...down but not yet out.” (2016) 3 (1) *MoneyMarketing* 11.

²⁷⁸ “Treating Customers Fairly in the Financial Sector: a draft market conduct policy framework for South Africa” *National Treasury* available at <http://www.treasury.gov.za/public%20comments/FSR2014/Treating%20Customers%20Fairly%20in%20the%20Financial%20Sector%20Draft%20MCP%20Framework%20Amended%20Jan2015%20WithAp6.pdf>, accessed on 4 September 2017 at 26.

of financial services.²⁷⁹ This would also have the result of consumers honouring their credit obligations and sustaining a healthy credit market. Furthermore, it is submitted that part of the problem lies in the fact that most credit providers are large corporate entities. These entities will seek efficient mechanisms and in the process, are likely to develop generic criteria to offer credit. This in turn leads to a tick box or generic approach which may lead to reckless credit.

3.2.5 The University of Pretoria's Research into Reckless Lending and EAOs

In 2013, the University of Pretoria conducted follow up research into the abuses surrounding EAOs.²⁸⁰ The prevalence of reckless lending was highlighted amongst consumers who had EAOs issued against their salaries.²⁸¹ The research team examined the credit agreements, in light of information obtained from credit bureaus and through conducting affordability assessments.²⁸² On the basis of this and other information at hand, reckless lending was uncovered.²⁸³ A shocking aspect discovered by the research team was that credit providers were extending credit or entering into new credit agreements with consumers who could not afford it.²⁸⁴

This aspect of the research conducted by the University of Pretoria indicates that reckless lending and a failure to conduct adequate affordability assessments, does have a link with the issuing of an EAO. It is indicative of the fact that if the initial pre-agreement assessments are not conducted properly, this will plunge the consumer

²⁷⁹ M Janse van Rensburg, P Venter and JW Strydom "The Perceived Contribution of the Practise of Strategic Marketing on the Performance of South African Companies" (2012) 9 (1) *Journal of Contemporary Management* 44.

²⁸⁰ "The incidence of and undesirable practices relating to "garnishee orders" – a follow up report" *University of Pretoria* available at <http://archivedpublicwebsite.up.ac.za/sitefiles/file/47/327/2013%20garnishee%20orders%20follow%20up%20report.pdf>, accessed on 4 September 2017. See 3.4 below for further discussion.

²⁸¹ "The incidence of and undesirable practices relating to "garnishee orders" – a follow up report" *University of Pretoria* available at <http://archivedpublicwebsite.up.ac.za/sitefiles/file/47/327/2013%20garnishee%20orders%20follow%20up%20report.pdf>, accessed on 4 September 2017 at 56.

²⁸² "The incidence of and undesirable practices relating to "garnishee orders" – a follow up report" *University of Pretoria* available at <http://archivedpublicwebsite.up.ac.za/sitefiles/file/47/327/2013%20garnishee%20orders%20follow%20up%20report.pdf>, accessed on 4 September 2017 at 56.

²⁸³ "The incidence of and undesirable practices relating to "garnishee orders" – a follow up report" *University of Pretoria* available at <http://archivedpublicwebsite.up.ac.za/sitefiles/file/47/327/2013%20garnishee%20orders%20follow%20up%20report.pdf>, accessed on 4 September 2017 at 56.

²⁸⁴ "The incidence of and undesirable practices relating to "garnishee orders" – a follow up report" *University of Pretoria* available at <http://archivedpublicwebsite.up.ac.za/sitefiles/file/47/327/2013%20garnishee%20orders%20follow%20up%20report.pdf>, accessed on 4 September 2017 at 56.

into a further trap of reckless lending and subsequent default, typically leading to an EAO. The foundation of the problem commences once credit providers grant reckless credit to consumers, thus creating a state of over-indebtedness. Following this, upon default by the consumer, the credit provider is then likely to use one of the many debt collection mechanisms like an EAO to recover the judgement debt.²⁸⁵

3.2.6 Case Law Identifying the Link Between Reckless Lending and EAOs

An example of reckless credit culminating in an EAO is *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others*²⁸⁶ where the court examined the credit agreements which the consumers were bound to and concluded that there were reckless lending practices prevalent.²⁸⁷

Furthermore, the pre-agreement assessments were either non-existent or not conducted properly.²⁸⁸ The court also remarked that it was not surprising that the consumers eventually defaulted as credit was granted recklessly.²⁸⁹ This remark is important because it reinforces the notion that when credit is granted in a reckless manner and no proper affordability assessment is conducted, default is almost inevitable and highly probable.

The above example illustrates that when credit providers contravene the provisions of the NCA pertaining to reckless lending and fail to conduct adequate affordability assessments, it is ultimately the consumer who suffers as he/she unsurprisingly defaults on the credit agreement. From this point, it is likely that judgement will be granted and unfortunately, this profile of consumers is unlikely to have proper legal representation. Moreover, it is likely that they do not understand their legal rights and the attendant legal and debt collection process. This leads to judgement which in turn culminates in an EAO. Up until the Constitutional Court order in the *Stellenbosch Law Clinic* case, EAOs were the most popular debt collection mechanism utilised by unscrupulous credit providers.²⁹⁰

²⁸⁵ See 3.4 below for further discussion.

²⁸⁶ (16703/14) [2015] ZAWCHC 99; 2015 (5) SA 221 (WCC); [2015] 3 All SA 644 (WCC); (2015) 36 ILJ 2558 (WCC) (8 July 2015).

²⁸⁷ Para 38.

²⁸⁸ Para 33.

²⁸⁹ Para 38.

²⁹⁰ "The incidence of and the undesirable practices relating to garnishee orders in South Africa" *The National Credit Regulator* available at <https://www.ncr.org.za/documents/pages/research-reports/oct08/GARNISHEE-ORDERS-STUDY-REPORT.pdf>, accessed on 7 September 2017.

Furthermore, as indicated by the High Court in the *Stellenbosch Law Clinic* case, default is inevitable when the consumer's financial position cannot sustain the obligations under the credit agreement.

3.2.7 Conclusion

It can thus be concluded that reckless credit invariably leads to a state of over-indebtedness and default on credit agreements. Upon default, it is mandatory that a credit provider complies with the NCA before obtaining judgement and executing against it.

3.3 Default and the Section 129 Notice

3.3.1 Introduction

Upon default on a credit agreement, the credit provider must issue a notice in terms of section 129 of the NCA. As per section 129, the credit provider is required to draw the default to the consumer's attention in writing.²⁹¹ This includes a proposal to the consumer that the credit agreement can be referred to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction.²⁹² The NCA envisages this to ensure the dispute between credit providers and consumers can be resolved, with a further intention to negotiate a payment plan to remedy the default.

²⁹³

3.3.2 Mandatory Section 129 Notice

In terms of the NCA, legal proceedings may only be instituted against the consumer if the consumer has been in default for at least twenty business days and at least ten days have elapsed since the section 129 notice was delivered.²⁹⁴ The credit provider can also institute legal proceedings if the consumer has not responded to the notice²⁹⁵ or responded by rejecting the credit provider's proposals.²⁹⁶

"The incidence of and undesirable practices relating to "garnishee orders" – a follow up report" University of Pretoria available at <http://archivedpublicwebsite.up.ac.za/sitefiles/file/47/327/2013%20garnishee%20orders%20follow%20up%20report.pdf>, accessed on 7 September 2017.

²⁹¹ Section 129 (1) (a) of the NCA.

²⁹² Section 129 (1) (a) of the NCA.

²⁹³ Section 129 (1) (a) of the NCA.

²⁹⁴ Section 130 (1) (a) of the NCA.

²⁹⁵ Section 130 (1) (b) (i) of the NCA.

²⁹⁶ Section 130 (1) (b) (ii) of the NCA.

The minority emphasised the importance of the section 129 notice in *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others; Association of Debt Recovery Agents NPC v University of Stellenbosch Legal Aid Clinic and Others; Mavava Trading 279 (Pty) Ltd and Others v University of Stellenbosch Legal Aid Clinic and Others*:²⁹⁷

- Section 130 (3) and (4) of the NCA requires a court to ensure that there has been compliance with section 129, if the matter is brought before a court.²⁹⁸
- The fact that a court must be satisfied that there was compliance with section 129 is a jurisdictional fact which must be proved before a court hearing can commence.²⁹⁹
- Furthermore, facts must be placed before court to show that section 129 as complied with.³⁰⁰

Approaching a court is expensive and time consuming and in some instances, a consumer may not be able to afford a lawyer to represent his/her legal interests. For these reasons, section 129 of the NCA was designed to allow consumers an opportunity to access other methods of dispute resolution and solutions to remedy the default before approaching a court.³⁰¹ It is submitted that the intention of the legislature in enacting section 129 was to alleviate the burden on the judiciary and allow for consumers to reach an agreement with credit providers, without judicial intervention.

3.3.3 The Issue of Sufficient Information in a Section 129 Notice

Unfortunately, the NCA is silent about what constitutes sufficient information to enable the consumer to respond adequately. ³⁰² In *Standard Bank of South Africa Ltd v Maharaj t/a Sanrow Transport*,³⁰³ it was held that the objectives of section 129 (1) (a) of the NCA are:

²⁹⁷ (CCT127/15) [2016] ZACC 32; 2016 (6) SA 596 (CC); (2016) 37 ILJ 2730 (CC); 2016 (12) BCLR 1535 (CC) (13 September 2016).

²⁹⁸ Para 25.

²⁹⁹ Para 25.

³⁰⁰ Para 25.

³⁰¹ M Kelly-Louw "The Default Notice as Required by the National Credit Act 34 of 2005" (2010) 22 (4) *SA Mercantile Law Journal* 570.

³⁰² M Kelly-Louw "The Default Notice as Required by the National Credit Act 34 of 2005" (2010) 22 (4) *SA Mercantile Law Journal* 572.

³⁰³ 2010 (5) SA 518 (KZP). Case referred to in M Kelly-Louw "The Default Notice as Required by the National Credit Act 34 of 2005" (2010) 22 (4) *SA Mercantile Law Journal* 573.

- 1) To bring the default to the attention of the consumer
- 2) Propose that the consumer makes use of one of the methods to remedy the default
- 3) Resolve the dispute or ensure that a plan is put forward to bring the payments up to date.³⁰⁴

In *Sebola and Another v Standard Bank of South Africa Ltd and Another*,³⁰⁵ Cameron J considered the meaning of deliver in terms of section 129. For the purposes of section 129, delivery does not require the credit provider to prove that the notice came to the attention of the consumer, neither does it require proof of delivery to an actual address.³⁰⁶ Furthermore, the credit provider must make the necessary averments to satisfy the court that on a balance of probabilities the notice reached the consumer.³⁰⁷

In the event that the notice is posted to the consumer, it is not sufficient to show that the mail has been dispatched.³⁰⁸ Cameron J was also alive to the fact that with posted mail, the risk of non-delivery is high.³⁰⁹ The NCA requires a credit provider to take reasonable measures to ensure that the notice is brought to the attention of the consumer.³¹⁰ In this instance, the credit provider must adduce proof to prove that the notice was delivered to the correct post office.³¹¹ To satisfy this requirement, the credit provider must have in his/her possession a post-despatch track and trace report from the South African post office.³¹²

A credit provider must allege in its summons or particulars of claim that the notice was delivered to the post office.³¹³ Afterwards, the post office would inform the consumer

³⁰⁴ Para 10.

³⁰⁵ (CCT 98/11) [2012] ZACC 11; 2012 (5) SA 142 (CC); 2012 (8) BCLR 785 (CC) (7 June 2012). Para 45: "Section 129(1) (a) requires a credit provider, before commencing any legal proceedings to enforce a credit agreement, to draw the default to the notice of the consumer in writing. It has been described as a "gateway" provision, or a "new pre-litigation layer to the enforcement process". Although section 129(1)(a) says the credit provider "may" draw the consumer's default to his or her notice, section 129(1)(b) (i) precludes the commencement of legal proceedings unless notice is first given. So, in effect, the notice is compulsory."

³⁰⁶ Para 74.

³⁰⁷ Para 74.

³⁰⁸ Para 75.

³⁰⁹ Para 75.

³¹⁰ Para 75.

³¹¹ Para 75.

³¹² Para 76.

³¹³ Para 77.

that a registered letter is awaiting collection.³¹⁴ Once this happens, a credit provider can make the necessary averments that the notice reached the consumer and a reasonable consumer would ensure that he/she fetches the notice from the post office.³¹⁵

The case of *Sebola* is important in credit law jurisprudence as it settles the law regarding what would constitute delivery to the consumer. This has remained controversial for some time. It is submitted that the place of *Sebola* in South African law is pivotal for a credit provider to rebut an allegation that a consumer may make that he/she did not receive the section 129 notice. Furthermore, it places an additional onus upon credit providers to show that there were efforts to ensure the notice reached the consumer.

It is submitted that while a credit provider must take the necessary steps to ensure that the section 129 notice is delivered to the consumer, it must also be drafted in a manner which enables the consumer to understand its contents. Moreover, the language used to draft the notice must be able to communicate to the consumer effectively that the default can be remedied. This can be achieved by ensuring that the notice is drafted in plain and understandable language.³¹⁶

*African Bank Limited v Additional Magistrate Myambo NO and Others*³¹⁷ held that while the NCA does not prescribe a format for the section 129 notice, it must be in plain language. Moreover, it must consider the class of persons who the notice is addressed to. A challenge surrounding the plain language issue is that lawyers utilise legal jargon and words which consumers do not necessarily comprehend, thus

³¹⁴ Para 77.

³¹⁵ Para 77.

³¹⁶ Section 63 (1) of the NCA: A consumer has a right to receive any document that is required in terms of this Act in an official language that the consumer reads or understands, to the extent that is reasonable having regard to usage, practicality, expense, regional circumstances and the balance of the needs and preferences of the population ordinarily served by the person required to deliver that document. Section 64(1) of the NCA: The producer of a document that is required to be delivered to a consumer in terms of this Act must provide that document -

(a) in the prescribed form, if any, for that document; or

(b) in plain language, if no form has been prescribed for that document. E de Stadler and L van Zyl "Plain Language Contracts: Challenges and Opportunities" (2017) 29 (1) *SA Mercantile Law Journal* 96.

³¹⁷ (34793/2008) [2010] ZAGPPHC 60; 2010 (6) SA 298 (GNP) (9 July 2010).

creating impediments for consumers to effectively understand legal documents.³¹⁸ Du Plessis J agreed with the case of *BMW Financial Services (SA) (Pty) Ltd v Dr MB Mulaudzi Inc*³¹⁹ where it was held that a section 129 notice must not be a mere reproduction of the actual section. While agreeing with this aspect of the judgement, Du Plessis J commented that the notice must also add important facts and options for the consumer to consider.

The section 129 notice is pivotal to the process as it could allow for a consumer to remedy the default. From the perspective of the credit provider, this would save legal costs because a court would not be approached for an enforcement of the credit agreement. On the other hand, the consumer could together with a debt counsellor restructure his/her financial affairs in a manner to satisfy debt obligations.

The case of *Kubyana v Standard Bank of South Africa Ltd (Socio-Economic Rights Institute of South Africa as amicus curiae)*³²⁰ clarified the *Sebola* judgement as to the requirements of what would constitute delivery in terms of the section 129 notice.³²¹ The Constitutional Court explained that in *Sebola*, section 129 requires that a credit provider bring the default to the attention of the consumer and make him/her aware that there are other remedies available, other than resorting to litigation.³²² Section 130 requires that a credit provider fulfil the obligation under section 129 by delivering a written notice to the consumer.³²³

Mhlantla AJ held that section 129 does not require the credit provider to bring the notice to the “subjective attention” of the consumer.³²⁴ Neither is it a requirement that personal service be utilised for it to constitute delivery, as per the NCA.³²⁵ When a

³¹⁸ E de Stadler and L van Zyl “Plain Language Contracts: Challenges and Opportunities” (2017) 29 (1) *SA Mercantile Law Journal* 96.

³¹⁹ 2009 (3) SA 348 (BPD).

³²⁰ 2014 (4) BCLR 400 (CC).

³²¹ The legal position pertaining to section 129 notices required clarification because the case law at that point of time was plagued with various conflicting decisions, regarding the correct interpretation of section 129. Moreover, the court regarded it imperative to clarify the interpretation of section 129 as the credit industry impacted the lives and rights of various stakeholders. Para 17 of *Kubyana*.

³²² Para 26.

³²³ Para 26.

³²⁴ Para 31.

³²⁵ Para 31.

section 129 notice has been dispatched to a consumer through post, a credit provider must discharge the onus with the following proof:

- 1) The notice was sent through registered mail to the correct post office, being the address which the consumer chose. Moreover, this assertion can be further strengthened through a track and trace report;
- 2) The post office did in fact notify the consumer that a registered mail was awaiting collection;
- 3) The notification must have reached the consumer – an inference can be advanced that the post office sent the notification to the consumer's correct address; and
- 4) A reasonable consumer would have collected the notice from the post office and read it. An inference can be drawn if the above three requirements have been complied with. Moreover, a consumer can rebut this if he/she can advance reasons to explain why the notice did not come to his/her attention.³²⁶

Thereafter, in *Nkata v FirstRand Bank Ltd and others*,³²⁷ there was no compliance with section 129 as the bank sent the notices to the incorrect addresses.³²⁸ The Constitutional Court held that this was irregular as the section 129 notice is a pivotal aspect of the debt collection process; furthermore, it was irregular on the grounds that the bank commenced litigation without complying with section 129 (1).³²⁹ Thus, the default judgement which was granted against the judgement debtor had no legal effect.³³⁰

Furthermore, the Constitutional Court held that the warrant of execution and public auction were set aside; this included prohibiting the transfer of the property to the third party who the bank supposedly sold the property to.³³¹ It is submitted that this can be lauded as a victory for consumers who fall prey to predatory practices by banks. Moreover, it reaffirms the principle that the credit providers need to take adequate

³²⁶ Para 54.

³²⁷ (CCT73/15) [2016] ZACC 12; 2016 (6) BCLR 794 (CC); 2016 (4) SA 257 (CC) (21 April 2016).

³²⁸ Para 4 and 5.

³²⁹ Para 163.

³³⁰ See order of court.

³³¹ See order of court.

steps to deliver the notice and that erroneous addresses would not suffice as an excuse.

3.3.4 Plain Language

The goal of implementing plain language into legal documents can be achieved, if South African lawyers change their mindsets pertaining to the way legal documents are drafted.³³² It is submitted that unscrupulous credit providers and lawyers must not use tactics to scare consumers, whereby for example they are threatened with legal language and thus misrepresent the law in the process. It is imperative that lawyers understand consumers' backgrounds and the factors which hinder their abilities to make decisions.³³³ Since South Africa is a diverse country, with a vast array of socio-economic problems, it would be a costly exercise to translate documents into consumers home languages; thus, credit providers should employ the services of individuals to explain the documents to consumers in their chosen language.³³⁴

In the *Stellenbosch Law Clinic* case, it was not made clear whether the consumers understood the contents of the section 129 notice. The High Court³³⁵ judgement reveals that the consumers were general workers on the lower end of the wage scale, who were uneducated and did not possess much knowledge about financial matters.³³⁶ The applicants in the matter alleged that they did not understand the contents of the legal documents, neither were any steps taken to ensure that the applicants knew what they were signing.³³⁷ While this was alleged in terms of the consent to judgement documents, it can be inferred that the likelihood that the applicants understood the section 129 notice is unlikely. It is submitted that this was

³³² E de Stadler and L van Zyl "Plain Language Contracts: Challenges and Opportunities" (2017) 29 (1) *SA Mercantile Law Journal* 102.

³³³ E de Stadler and L van Zyl "Plain Language Contracts: Challenges and Opportunities" (2017) 29 (1) *SA Mercantile Law Journal* 102.

³³⁴ E de Stadler and L van Zyl "Plain Language Contracts: Challenges and Opportunities" (2017) 29 (1) *SA Mercantile Law Journal* 108.

³³⁵ *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice And Correctional Services and Others* (16703/14) [2015] ZAWCHC 99; 2015 (5) SA 221 (WCC); [2015] 3 All SA 644 (WCC); (2015) 36 ILJ 2558 (WCC) (8 July 2015).

³³⁶ Para 11.

³³⁷ Para 25.

probably the reason why the consumers did not approach debt counsellors or alternate dispute resolution agents.

It is interesting to note Du Plessis J's remark in *Myambo* regarding a section 129 notice in the context of a consent to judgement. It was held that to ensure the consumer made an informed decision when signing the consent to judgement, it is essential that a consumer understood the alternatives to approaching court. The consumer must also have been given an opportunity to pursue those alternatives.

3.3.5 Conclusion

Upon default on a credit agreement, it is imperative that credit providers comply with section 129 of the NCA. It has been illustrated that a failure to comply with the section will lead to the process being set aside. Following the section 129 notice, civil procedure dictates a process which must be followed, before a credit provider can eventually execute against the judgement in the form of an EAO.

3.4 Debt Collection Process and EAO

3.4.1 Introduction

The next step after issuing a section 129 notice is to issue summons against the consumer and if he/she does not defend it or respond to it, the credit provider can then apply for default judgement.³³⁸ As alluded to above, it is unlikely that a vulnerable consumer would defend the legal action in court or respond to the summons.

3.4.2 Procedure to Obtain An EAO

Once judgement has been granted against the consumer, he/she then becomes known as the judgement debtor. Thereafter, the judgement creditor obtains an EAO to execute against the judgement.³³⁹ An EAO is typically used when the judgement debtor does not own any movable or immovable property; it is also used when the value of the property is insufficient to satisfy and execute the judgement debt.³⁴⁰

³³⁸ S Pete... et al *Civil Procedure: A Practical Guide* 2 ed (2011) 268.

³³⁹ S Pete... et al *Civil Procedure: A Practical Guide* 2 ed (2011) 347.

³⁴⁰ S Pete... et al *Civil Procedure: A Practical Guide* 2 ed (2011) 347.

EAOs are governed by the MCA, which defines and sets out the procedure to obtain one against the judgement debtor. Section 61 of the MCA defines emoluments as: “(i) salary, wages or any other form of remuneration; and (ii) any allowances, whether expressed in money or not.” As per section 65J of the MCA, an EAO obliges the judgement debtor’s employer to attach a certain portion of his/her salary and pay it over to the judgment creditor, to satisfy the amount of the judgement debt.³⁴¹

Initially,³⁴² section 65J of the MCA entailed two procedures to obtain an EAO. The first procedure was:³⁴³

- Obtain written consent of the judgement debtor; or
- Authorisation from the court

The second procedure which could be adopted was:³⁴⁴

- The judgement creditor sends a registered letter to the judgement debtor which details the amount and costs of the judgement debt. This includes a warning that an EAO will be issued within 10 days of the registered letter being sent, if the amount of the judgement debt is not satisfied; and
- The judgement creditor or his/her attorney must file an affidavit with the clerk of court detailing the amount of the judgement debt and if any instalments have been received.

3.4.3 Issues Surrounding EAOs

In 2008, the University of Pretoria conducted research into the prevalence of EAOs in South Africa and found that the above-mentioned processes were flawed with abuses.³⁴⁵ The research revealed that section 65J of the MCA was problematic. The first reason for it being problematic was that a clerk of court had no mechanism to verify the authenticity of the signature on the written consent to judgement, how it was obtained or the fairness of the instalments.³⁴⁶ The second issue lies in section 65J (2)

³⁴¹ DE van Loggerenberg *Jones and Buckle: Civil Practice of the Magistrates’ Courts in South Africa* 10 ed. (2017) 441.

³⁴² The procedures as set out in the MCA, prior to the Constitutional Court’s judgement in the *Stellenbosch Law Clinic* case and subsequent amendments to the MCA.

³⁴³ Section 65J (2) (a) of the MCA.

³⁴⁴ Section 65J (2) (b) (i) and (ii) of the MCA.

³⁴⁵ “The incidence of and the undesirable practices relating to garnishee orders in South Africa” *The National Credit Regulator* available at <https://www.ncr.org.za/documents/pages/research-reports/oct08/GARNISHEE-ORDERS-STUDY-REPORT.pdf>, accessed on 15 September 2017.

³⁴⁶ “The incidence of and the undesirable practices relating to garnishee orders

(b) of the MCA as it does not compel the judgement creditor to disclose the amount of the instalment to be deducted.³⁴⁷

In addition to the above, the Law Society of South Africa (LSSA) expressed its concern about the abuses prevalent in EAOs.³⁴⁸ It identified four factors which contribute to the problems surrounding EAOs:³⁴⁹

- 1) Reckless credit;
- 2) The way consents to judgement are obtained and the fact that a significant portion of a judgement debtor's salary is attached;
- 3) Clerks of court are not equipped with the correct knowledge to identify abuses and subsequently refuse to grant EAOs;
- 4) The law regulating EAOs is weak as it allows for an EAO to be obtained without judicial oversight.

It is submitted that for the purposes of this dissertation, the first factor identified by the LSSA is important. The impact of reckless credit in the EAO process is further reinforced by Desai J's statement in the *Stellenbosch Law Clinic* judgement:

*"Moreover the clinic's uneducated and financially unsophisticated clients were frequently the victims of predatory lending practices by credit providers which ultimately resulted in them defaulting on their payments. What followed was an EAO and a cycle of debt from which there was little, if any, hope of escape."*³⁵⁰

The concerns expressed by the LSSA are relevant because it highlights the need for judicial oversight in the EAO process. Moreover, it relates to the *Stellenbosch Law Clinic* case as both the High Court and Constitutional Court highlighted the problems associated to the absence of judicial oversight. It is submitted that these factors

in South Africa" *The National Credit Regulator* available at <https://www.ncr.org.za/documents/pages/research-reports/oct08/GARNISHEE-ORDERS-STUDY-REPORT.pdf>, accessed on 15 September 2017 at 7.

³⁴⁷ "The incidence of and the undesirable practices relating to garnishee orders in South Africa" *The National Credit Regulator* available at <https://www.ncr.org.za/documents/pages/research-reports/oct08/GARNISHEE-ORDERS-STUDY-REPORT.pdf>, accessed on 15 September 2017 at 8.

³⁴⁸ B Whittle "LSSA condemns unscrupulous garnishee practices" (2013) *De Rebus* 13.

³⁴⁹ B Whittle "LSSA condemns unscrupulous garnishee practices" (2013) *De Rebus* 13.

³⁵⁰ *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice And Correctional Services and Others* (16703/14) [2015] ZAWCHC 99; 2015 (5) SA 221 (WCC); [2015] 3 All SA 644 (WCC); (2015) 36 ILJ 2558 (WCC) (8 July 2015) at para 11.

identified by the LSSA are a pivotal link to this research as apart from the University of Pretoria, it is significant that the legal profession formally acknowledged the inherent abuses in the EAO process. Considering the order made by the Constitutional Court in the *Stellenbosch Law Clinic* case and subsequent amendments to the MCA, the factors identified by LSSA have been acknowledged and subsequently remedied.

Van Niekerk submits that the fact that an EAO has been issued against the judgement debtor is an indication that he/she is over-indebted or a victim of reckless credit.³⁵¹ The author even points out that in some instances he/she can be a victim of reckless lending and over-indebtedness.³⁵² It is submitted that this may be the case in some instances and will not apply to all cases of EAOs, as some credit agreements are not necessarily reckless. Furthermore, in some instances, default could occur on a legitimate credit agreement due to the changing financial circumstances of the consumer, such as he/she may be retrenched or lose their main source of income.

The University of Pretoria found that the popular way in which an EAO was obtained was: following the debtor's signature of the consent to judgment in terms of sections 57 and 58 of the MCA, default judgement would then be granted followed by an EAO.³⁵³ While other debt collection mechanisms exist in the MCA, the research produced by the University of Pretoria reveals that an EAO is a favourable mechanism as in some instances, a judgement debtor may not have other assets which could be attached.³⁵⁴ From the perspective of credit, another reason that an EAO is a favourable debt collection mechanism is due to the fact that unscrupulous credit providers who engage in unsecured lending deem an EAO to be a form of security.³⁵⁵

³⁵¹ B van Niekerk "The Use of Emolument Attachment Orders, Jurisdiction and Forum Shopping under the Spotlight" (2015) *De Rebus* 60.

³⁵² B van Niekerk "The Use of Emolument Attachment Orders, Jurisdiction and Forum Shopping under the Spotlight" (2015) *De Rebus* 60.

³⁵³ "The incidence of and the undesirable practices relating to garnishee orders in South Africa" *The National Credit Regulator* available at <https://www.ncr.org.za/documents/pages/research-reports/oct08/GARNISHEE-ORDERS-STUDY-REPORT.pdf>, accessed on 15 September 2017 at 59.

³⁵⁴ "The incidence of and the undesirable practices relating to garnishee orders in South Africa" *The National Credit Regulator* available at <https://www.ncr.org.za/documents/pages/research-reports/oct08/GARNISHEE-ORDERS-STUDY-REPORT.pdf>, accessed on 15 September 2017 at 59.

³⁵⁵ "The incidence of and undesirable practices relating to "garnishee orders" – a follow up report" *University of Pretoria* available at <http://archivedpublicwebsite.up.ac.za/sitefiles/file/47/327/2013%20garnishee%20orders%20follow%20up%20report.pdf>, accessed on 16 September 2017 at 56.

Through various case studies, the University of Pretoria found that there were many abuses prevalent in the EAO system. These included debtors being unaware of the consents to judgement, signatures obtained through duress or misrepresentation, fraudulent signatures and documents which were incomplete.³⁵⁶ Judgement creditors would forum shop for courts to entertain their applications and these courts would be in the incorrect jurisdiction.³⁵⁷ It is submitted that this is contrary to the principles of access to redress as the judgment debtor is ultimately disadvantaged; furthermore, his/her access to redress and ability to approach a court is compromised.

In some instances, the amount of the judgement debt would be exorbitant because unlawful and unjustified charges were added onto the capital amount.³⁵⁸ The research also exposed a lack of communication between employers and judgement creditors: in some cases, despite an order being set aside by a court, deductions from the judgement debtor's salary continued.³⁵⁹ The judgement creditors were also found to have obtained more than one judgement and in some cases more than one EAO would be issued against the judgement debtor for the same debt.³⁶⁰

The issue of financial ignorance negatively impacts a consumer's ability to make informed decisions about their financial wellbeing.³⁶¹ Moreover, it was found that due to this ignorance, consumers would sign documentation relating to default judgements

³⁵⁶ "The incidence of and the undesirable practices relating to garnishee orders in South Africa" *The National Credit Regulator* available at <https://www.ncr.org.za/documents/pages/research-reports/oct08/GARNISHEE-ORDERS-STUDY-REPORT.pdf>, accessed on 15 September 2017 at 10.

³⁵⁷ "The incidence of and the undesirable practices relating to garnishee orders in South Africa" *The National Credit Regulator* available at <https://www.ncr.org.za/documents/pages/research-reports/oct08/GARNISHEE-ORDERS-STUDY-REPORT.pdf>, accessed on 15 September 2017 at 10.

³⁵⁸ "The incidence of and the undesirable practices relating to garnishee orders in South Africa" *The National Credit Regulator* available at <https://www.ncr.org.za/documents/pages/research-reports/oct08/GARNISHEE-ORDERS-STUDY-REPORT.pdf>, accessed on 15 September 2017 at 10.

³⁵⁹ "The incidence of and the undesirable practices relating to garnishee orders in South Africa" *The National Credit Regulator* available at <https://www.ncr.org.za/documents/pages/research-reports/oct08/GARNISHEE-ORDERS-STUDY-REPORT.pdf>, accessed on 15 September 2017 at 10.

³⁶⁰ "The incidence of and the undesirable practices relating to garnishee orders in South Africa" *The National Credit Regulator* available at <https://www.ncr.org.za/documents/pages/research-reports/oct08/GARNISHEE-ORDERS-STUDY-REPORT.pdf>, accessed on 15 September 2017 at 11.

³⁶¹ "The incidence of and the undesirable practices relating to garnishee orders in South Africa" *The National Credit Regulator* available at <https://www.ncr.org.za/documents/pages/research-reports/oct08/GARNISHEE-ORDERS-STUDY-REPORT.pdf>, accessed on 15 September 2017 at 122.

before it is obtained.³⁶² This finding by the University of Pretoria reinforces the fact that consumers need to be exposed to some sort of financial education, which would enable them to make decisions which do not compromise their financial wellbeing.

3.4.4 The Absence of Judicial Oversight in the EAO Process

While clerks of court play a pivotal role in the debt collection process, some clerks were colluding with the judgement creditors as they were accepting bribes to secure EAOs.³⁶³ The manner in which an EAO would be served on the judgement debtor's employer was found to be flawed as some other individual would serve the document, not the sheriff.³⁶⁴ In some instances, the EAO would be faxed to the employer.³⁶⁵ Clerks of court do not possess the requisite knowledge to evaluate the documentation before them and would often grant orders, which were to the detriment of the judgement debtor.³⁶⁶

In the absence of judicial oversight combined with clerks of court not possessing the requisite knowledge, the research conducted by the University of Pretoria recommended that judicial oversight would be a solution to remedy the abuses in the EAO process.³⁶⁷ It is submitted that this recommendation would be appropriate because a magistrate, by virtue of his/her legal knowledge would be able to make a proper assessment before granting an EAO. Moreover, a magistrate possesses the

³⁶² "The incidence of and the undesirable practices relating to garnishee orders in South Africa" *The National Credit Regulator* available at <https://www.ncr.org.za/documents/pages/research-reports/oct08/GARNISHEE-ORDERS-STUDY-REPORT.pdf>, accessed on 15 September 2017 at 122.

³⁶³ "The incidence of and the undesirable practices relating to garnishee orders in South Africa" *The National Credit Regulator* available at <https://www.ncr.org.za/documents/pages/research-reports/oct08/GARNISHEE-ORDERS-STUDY-REPORT.pdf>, accessed on 15 September 2017 at 122.

³⁶⁴ "The incidence of and the undesirable practices relating to garnishee orders in South Africa" *The National Credit Regulator* available at <https://www.ncr.org.za/documents/pages/research-reports/oct08/GARNISHEE-ORDERS-STUDY-REPORT.pdf>, accessed on 15 September 2017 at 123.

³⁶⁵ "The incidence of and the undesirable practices relating to garnishee orders in South Africa" *The National Credit Regulator* available at <https://www.ncr.org.za/documents/pages/research-reports/oct08/GARNISHEE-ORDERS-STUDY-REPORT.pdf>, accessed on 15 September 2017 at 123.

³⁶⁶ "The incidence of and the undesirable practices relating to garnishee orders in South Africa" *The National Credit Regulator* available at <https://www.ncr.org.za/documents/pages/research-reports/oct08/GARNISHEE-ORDERS-STUDY-REPORT.pdf>, accessed on 15 September 2017 at 123.

³⁶⁷ "The incidence of and the undesirable practices relating to garnishee orders in South Africa" *The National Credit Regulator* available at <https://www.ncr.org.za/documents/pages/research-reports/oct08/GARNISHEE-ORDERS-STUDY-REPORT.pdf>, accessed on 15 September 2017 at 124.

necessary skills to identify flaws in applications such as fraud and reject such applications. This problematic position has been remedied by the Constitutional Court in the *Stellenbosch Law Clinic* case and subsequent amendments to the MCA.³⁶⁸

3.4.5 Remedy to the Issues Surrounding EAOs³⁶⁹

Following the above-mentioned concerns and abuses identified, an application was brought before the Western Cape High Court, to declare section 65J of the MCA unconstitutional for failure to provide for mandatory judicial oversight.³⁷⁰ The court *a quo* made an order of invalidity which rendered section 65J of the MCA unconstitutional for failure to provide for judicial oversight.³⁷¹

Subsequently, the Constitutional Court³⁷² elected not to confirm the order of invalidity by the court *a quo* and instead remedied section 65J of the MCA, through the joint interpretative mechanism of severance and reading in.³⁷³ Thus, Constitutional Court order made judicial oversight mandatory in the EAO process.³⁷⁴ It is submitted that

³⁶⁸ To be discussed below and in chapter 4.

³⁶⁹ This aspect will be discussed in more detail in chapter 4.

³⁷⁰ *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice And Correctional Services and Others* (16703/14) [2015] ZAWCHC 99; 2015 (5) SA 221 (WCC); [2015] 3 All SA 644 (WCC); (2015) 36 ILJ 2558 (WCC) (8 July 2015). To be discussed further in chapter four.

³⁷¹ Para 94.

³⁷² *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others; Association of Debt Recovery Agents NPC v University of Stellenbosch Legal Aid Clinic and Others; Mavava Trading 279 (Pty) Ltd and Others v University of Stellenbosch Legal Aid Clinic and Others* (CCT127/15) [2016] ZACC 32. To be discussed further in chapter four.

³⁷³ Para 209.

³⁷⁴ “65J. Emoluments attachment orders

...

(2) An emoluments attachment order shall not be issued—

(a) unless the judgment debtor has consented thereto in writing ~~or~~ and the court has so authorised after satisfying itself that it is just and equitable that an emoluments attachment order be issued and that the amount is appropriate, whether on application to the court or otherwise, and such authorisation has not been suspended; or

(b) unless the judgment creditor or his or her attorney has first —

this approach adopted by the majority is far more favourable and appropriate. This is because the court correctly interpreted the “or” in section 65J (2) (a) as optional, thus judicial oversight was not mandatory prior to the order.³⁷⁵

The effect of the joint interpretative mechanism of severance and reading in³⁷⁶ utilised by the Constitutional Court subsequently remedied section 65J of the MCA. For the purposes of this research, it is significant that the Constitutional Court severed the “or” from section 65J (2) (a) of the MCA and thus read in “and.” This means that a judgement creditor must obtain the consent of the judgement debtor and authorisation from the Court before an EAO can be authorised and subsequently issued.

Following the order from the Constitutional Court, the MCA was amended by the Courts of Law Amendment Act 7 of 2017.³⁷⁷ The amendment renders judicial oversight mandatory, thus giving effect to the order of the Constitutional Court. Furthermore, a

(i) sent a registered letter to the judgment debtor at his or her last known address advising him or her of the amount of the judgment debt and costs as yet unpaid and warning him or her that an emoluments attachment order ~~will~~ may be issued if the said amount is not paid within ten days of the date on which that registered letter was posted; and

(ii) filed with the clerk of the court an affidavit or an affirmation by the judgment creditor or a certificate by his or her attorney setting forth the amount of the judgment debt at the date of the order laying down the specific instalments, the costs, if any, which have accumulated since that date, the payments received since that date and the balance owing and declaring that the provisions of subparagraph (i) have been complied with on the date specified therein; and

(iii) been granted an order of court authorising that an emoluments attachment order be issued after satisfying itself that it is just and equitable that the order be issued and that the amount is appropriate.”

³⁷⁵ To be discussed further in chapter 4.

³⁷⁶ To be discussed further in chapter 4.

³⁷⁷ To be discussed further in chapter 4.

statutory cap of a maximum of 25% has been imposed by the legislature, regarding the percentage of a judgement debtor's salary which can be attached.

The amendments have also outlined a new process upon which an EAO may be obtained. Unlike the previous statutory position and subsequent abuses prevalent in the EAO system, a judgment debtor will play a greater role and not face exclusion from the process. The amendments have encapsulated the essence of the Constitutional Court order as judicial oversight is now mandatory.³⁷⁸

3.4.6 The Status of Future EAOs

According to the research conducted in this paper, there is a link between reckless credit and EAOs. As alluded to previously, this link exacerbated due to reckless lending practices employed by unscrupulous credit providers.

Fortunately for consumers and judgement debtors in South Africa, National Treasury and BASA acknowledged the inherent flaws in the credit and debt collection industries. It is also commendable that the legislature intervened and sought to remedy the issues surrounding credit and debt collection. Owing to the NCA amendments, court litigation surrounding EAOs and MCA amendments, these would have an impact upon the link between reckless credit and EAOs.

As the legislature has introduced a stringent EAO process with the MCA amendments, this could lead to the link this paper has demonstrated being ameliorated, or even severed. In line with the NCA amendments and Affordability Assessment Guidelines, credit providers have a benchmark which their pre-agreement assessment models and mechanisms must conform with. It is submitted that this can remedy the foundation of the link, as reckless lending practices inevitably result in default and increase the likelihood for an EAO against the judgement debtor.

While this research did not seek to evaluate whether EAOs should still be utilised despite its various flaws, it is submitted that this debt collection mechanism remains valuable. While the MCA amendments are deemed a positive step in the debt collection industry, the inclusion of mandatory judicial oversight will ameliorate the link between reckless credit and EAOs. From this point forward, the process to obtain an

³⁷⁸ To be discussed further in chapter 4.

EAO will be a stringent one whereby the inclusion of a magistrate in the process will require the procedure to be free of abuses and flaws.

It is submitted that the link can be broken by the amendments to the law regulating reckless lending and EAOs. This can be done through holding unscrupulous credit providers and other stakeholders such as attorneys, law enforcement officials amongst others accountable for unlawful conduct. Moreover, the link can also be broken if the credit industry begins engaging in responsible lending practices. For this to be successful, the NCR must play a proactive role in enforcing sanctions against credit providers who contravene the NCA. Also, with regards to the amendments to the NCA and MCA, these changes to the law must be enforced effectively to break such link.

3.4.7 Conclusion

EAOs have been a contentious debt collection mechanism owing to the abuses and lack of judicial oversight in the process. With a new debt collection procedure introduced, the issues and link between reckless credit and EAOS will break. Furthermore, from a consumer protection perspective, consumers and judgement debtors will receive more protection under this new system of debt collection.

3.5 Conclusion

Due to the fact that credit plays a fundamental role in the lives of South Africans, credit providers need to ensure that there are financial education programmes available to educate the public.

It must be borne in mind that government cannot sustain the responsibility of providing financial education programmes due to the pressure already upon it in terms of its other mandates. A financial education program will assist South Africans in making better financial decisions and may result in fewer defaults and EAOs.

While there are no concrete statistics to prove that a link exists between reckless lending and EAOs, anecdotal evidence proves this link. The *Stellenbosch Law Clinic* judgement and other case law, the University of Pretoria research report and the other academic articles referred to further reinforce this link. These sources demonstrate that once a consumer becomes a victim of reckless lending, it is inevitable that default will occur and that they become trapped in a vicious cycle.

As illustrated above, there appears to be a dire need of reform and for consumers to make informed decisions before signing certain key documents. Furthermore, judicial supervision is required in the EAO process to ensure that a just and equitable order is made. The next chapter will discuss if judicial supervision is indeed the solution to improving the law on EAOs and the manner in which EAOs are currently regulated, in light of the *Stellenbosch Law Clinic* judgement.

Chapter 4

The Current Regulation of Emolument Attachment Orders

4.1 Introduction

To illustrate the link between reckless credit and EAOs, it is essential to examine the current regulation of EAOs and the mandatory inclusion of judicial oversight into South African law. This is to determine the amendments to the law surrounding EAOs by virtue of case law and statutory amendments. An EAO obliges an employer to attach a certain portion of the judgement debtor's wages or salary and pay it over to the judgement creditor.³⁷⁹ This continues until the total amount of the judgement debt has been satisfied.³⁸⁰

As alluded to in chapter three,³⁸¹ EAOs have been found to be plagued with various abuses and problems.³⁸² These included fraudulently obtained signatures on consent to judgements, court officials being inadequately trained to identify irregularities in EAO applications and an unreasonable portion of the judgement debtors' salaries/wages being attached.³⁸³

³⁷⁹ Section 65J of the MCA. DE van Loggerenberg *Jones and Buckle: Civil Practice of the Magistrates' Courts in South Africa* 10 ed (2017) 442. S Pete... et al *Civil Procedure: A Practical Guide* 2 ed (2011) 347.

³⁸⁰ Section 65J of the MCA. DE van Loggerenberg *Jones and Buckle: Civil Practice of the Magistrates' Courts in South Africa* 10 ed (2017) 443. S Pete... et al *Civil Procedure: A Practical Guide* 2 ed (2011) 347.

³⁸¹ See 3.4 in chapter 3.

³⁸² "The incidence of and the undesirable practices relating to garnishee orders in South Africa" *The National Credit Regulator* available at <https://www.ncr.org.za/documents/pages/research-reports/oct08/GARNISHEE-ORDERS-STUDY-REPORT.pdf>, accessed on 26 September 2017. "The incidence of and undesirable practices relating to "garnishee orders" – a follow up report" *University of Pretoria* available at <http://archivedpublicwebsite.up.ac.za/sitefiles/file/47/327/2013%20garnishee%20orders%20follow%20up%20report.pdf>, accessed on 26 September 2017.

³⁸³ "The incidence of and the undesirable practices relating to garnishee orders in South Africa" *The National Credit Regulator* available at <https://www.ncr.org.za/documents/pages/research-reports/oct08/GARNISHEE-ORDERS-STUDY-REPORT.pdf>, accessed on 26 September 2017. "The incidence of and undesirable practices relating to "garnishee orders" – a follow up report" *University of Pretoria* available at <http://archivedpublicwebsite.up.ac.za/sitefiles/file/47/327/2013%20garnishee%20orders%20follow%20up%20report.pdf>, accessed on 26 September 2017.

These apparent flaws brought the EAO process into disrepute as judgement debtors were not adequately protected and were victims of reckless lending practices.³⁸⁴ Moreover, unscrupulous lenders took undue advantage of consumers who had a salary/wage which could be attached, as some consumers did not have any other movable or immovable property.³⁸⁵ Note that certain institutions recognised these flaws and chose not to utilise EAOs against defaulting debtors due to the negative impact it has on these debtors.³⁸⁶

Following the above, the turning point for EAOs occurred in 2015, when a private citizen, Wendy Appelbaum became increasingly concerned about the EAOs issued against some of her employees.³⁸⁷ She observed that in some instances, more than half of their salaries were attached, to satisfy the amount of the judgement debt.³⁸⁸ Thus, Appelbaum began studying the relevant provisions of the NCA and MCA, as her employees were vulnerable consumers who relied heavily on their salaries to sustain themselves.³⁸⁹

³⁸⁴ “The incidence of and undesirable practices relating to “garnishee orders” – a follow up report” *University of Pretoria* available at <http://archivedpublicwebsite.up.ac.za/sitefiles/file/47/327/2013%20garnishee%20orders%20follow%20up%20report.pdf>, accessed on 26 September 2017 at 55.

³⁸⁵ “The incidence of and undesirable practices relating to “garnishee orders” – a follow up report” *University of Pretoria* available at <http://archivedpublicwebsite.up.ac.za/sitefiles/file/47/327/2013%20garnishee%20orders%20follow%20up%20report.pdf>, accessed on 26 September 2017 at 56.

³⁸⁶ “Joint statement by the Minister of Finance and the chairperson of the Banking Association of South Africa” *National Treasury* available at http://www.treasury.gov.za/comm_media/press/2012/2012110101.pdf, accessed on 11 October 2017 at 3.

³⁸⁷ “Wendy Appelbaum throws weight behind ‘garnishee’ case” *Moneyweb* available at <https://www.moneyweb.co.za/in-depth/investigations/wendy-appelbaum-throws-weight-behind-garnishee-cas/>, accessed on 26 September 2017.

³⁸⁸ “Wendy Appelbaum throws weight behind ‘garnishee’ case” *Moneyweb* available at <https://www.moneyweb.co.za/in-depth/investigations/wendy-appelbaum-throws-weight-behind-garnishee-cas/>, accessed on 26 September 2017.

³⁸⁹ “Wendy Appelbaum throws weight behind ‘garnishee’ case” *Moneyweb* available at <https://www.moneyweb.co.za/in-depth/investigations/wendy-appelbaum-throws-weight-behind-garnishee-cas/>, accessed on 26 September 2017.

Together with the University of Stellenbosch Legal Aid Clinic, law firm Webber Wentzel and Summit Financial Partners,³⁹⁰ litigation began in the Western Cape High Court.³⁹¹ The applicants who were consumers from the lower end of the wage scale fell prey to the predatory practices of unscrupulous credit providers.³⁹² In applying to court, the applicants sought an order declaring that sections 65J (2) (a), 65J (2) (b) (i) and 65J (ii) of the MCA unconstitutional for a failure to provide for judicial oversight.³⁹³ Furthermore, the applicants sought relief for setting aside the EAOs issued against them for utilising the incorrect jurisdiction and for them being inherently unlawful.³⁹⁴

The High Court granted the relief which the applicants sought and declared the relevant provisions of section 65J of the MCA unconstitutional, for failure to provide for judicial oversight.³⁹⁵ As this was an order of invalidity, this required confirmation by the Constitutional Court.³⁹⁶ Instead of declaring the relevant provisions of the MCA unconstitutional, the Constitutional Court chose to remedy the provisions through a joint interpretive mechanism of severance and reading in.³⁹⁷ For the purposes of this dissertation, the important aspect from the judgement is the requirement that EAOs are now subjected to judicial oversight, by a magistrate.³⁹⁸ The nature of the Constitutional Court's judgement is that it is prospective, as of 13 September 2016.³⁹⁹

³⁹⁰“Wendy Appelbaum throws weight behind ‘garnishee’ case” *Moneyweb* available at <https://www.moneyweb.co.za/in-depth/investigations/wendy-appelbaum-throws-weight-behind-garnishee-cas/>, accessed on 26 September 2017.

³⁹¹ *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others* (16703/14) [2015] ZAWCHC 99; 2015 (5) SA 221 (WCC); [2015] 3 All SA 644 (WCC); (2015) 36 ILJ 2558 (WCC) (8 July 2015).

³⁹² Para 10 and 11.

³⁹³ Para 20.

³⁹⁴ Para 21 and 22.

³⁹⁵ Para 94.

³⁹⁶ *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others; Association of Debt Recovery Agents NPC v University of Stellenbosch Legal Aid Clinic and Others; Mavava Trading 279 (Pty) Ltd and Others v University of Stellenbosch Legal Aid Clinic and Others* (CCT127/15) [2016] ZACC 32; 2016 (6) SA 596 (CC); (2016) 37 ILJ 2730 (CC); 2016 (12) BCLR 1535 (CC) (13 September 2016).

³⁹⁷ Para 209.

³⁹⁸ Para 212: “(2) An emoluments attachment order shall not be issued—

(a) unless the judgment debtor has consented thereto in writing ~~or~~ and the court has so authorised after satisfying itself that it is just and equitable that an emoluments attachment order be issued and that the amount is appropriate, whether on application to the court or otherwise, and such authorisation has not been suspended”

³⁹⁹ Para 211.

This chapter will discuss the High Court⁴⁰⁰ and Constitutional Court⁴⁰¹ judgements, including the effect of the order issued by the Constitutional Court. Furthermore, it will assess whether judicial oversight is effective when issuing an EAO. This chapter will also consider the proposed amendments to the MCA regarding the way EAOs can be issued.⁴⁰² To propose amendments to the law on EAOs, a brief foreign comparative analysis will be conducted.

4.2 University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others⁴⁰³

4.2.1 Introduction – Context on EAOs

As alluded to above,⁴⁰⁴ an EAO is a form of execution against a judgement issued against the judgement debtor. Once a consumer defaults on a credit agreement, the credit provider will issue a mandatory notice in terms of section 129 of the NCA. The next step after issuing a section 129 notice is to issue summons against the consumer and if he/she does not defend or respond to it, the credit provider can then apply for default judgement.⁴⁰⁵

Once judgement has been granted against the consumer, he/she then becomes known as the judgement debtor. Thereafter, the judgement creditor can obtain an EAO to execute against the judgement.⁴⁰⁶ An EAO is typically used when the judgement debtor does not own any movable or immovable property; it is also used when the value of the property is insufficient to satisfy and execute the judgement debt.⁴⁰⁷ An EAO is a popular⁴⁰⁸ debt collection mechanism whereby the judgement debtor's

⁴⁰⁰ *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others* (16703/14) [2015] ZAWCHC 99; 2015 (5) SA 221 (WCC); [2015] 3 All SA 644 (WCC); (2015) 36 ILJ 2558 (WCC) (8 July 2015).

⁴⁰¹ *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others; Association of Debt Recovery Agents NPC v University of Stellenbosch Legal Aid Clinic and Others; Mavava Trading 279 (Pty) Ltd and Others v University of Stellenbosch Legal Aid Clinic and Others* (CCT127/15) [2016] ZACC 32; 2016 (6) SA 596 (CC); (2016) 37 ILJ 2730 (CC); 2016 (12) BCLR 1535 (CC) (13 September 2016).

⁴⁰² See 4.4 below.

⁴⁰³ (16703/14) [2015] ZAWCHC 99; 2015 (5) SA 221 (WCC); [2015] 3 All SA 644 (WCC); (2015) 36 ILJ 2558 (WCC) (8 July 2015).

⁴⁰⁴ See 4.1 above.

⁴⁰⁵ S Pete... et al *Civil Procedure: A Practical Guide* 2 ed (2011) 268.

⁴⁰⁶ S Pete... et al *Civil Procedure: A Practical Guide* 2 ed (2011) 347.

⁴⁰⁷ S Pete... et al *Civil Procedure: A Practical Guide* 2 ed (2011) 347.

⁴⁰⁸ "The incidence of and undesirable practices relating to "garnishee orders" – a follow up report" *University of Pretoria* available at

employer is obliged to attach an amount of the judgement debtor's salary or wage and pay it to the judgement creditor, until such time that the total amount of the judgement debt is fulfilled.⁴⁰⁹

Unlike other forms of execution, an EAO is a powerful debt collection mechanism as the judgement creditor is guaranteed repayment of the judgement debt, if the judgement debtor is employed. Furthermore, provided the judgement debtor remains employed, his/her salary serves as a form of security to the judgement creditor due to the guarantee and purpose that the judgement debtor's wage/salary serves to the debt collection process.⁴¹⁰

4.2.2 Judgement by Desai J

In the High Court litigation of the *Stellenbosch Law Clinic* case, there were sixteen applicants in the matter and eighteen respondents,⁴¹¹ with one *amicus curiae*.⁴¹² The first applicant was the University of Stellenbosch Legal Aid Clinic, which observed many abuses and instances of fraud in the EAO process.⁴¹³ The legal aid clinic represented indigent clients who were victims of reckless lending practices and caught in a vicious debt trap.⁴¹⁴ The legal aid clinic sought the necessary relief from the court in the public interest, as per section 38 (1) (d) of the Constitution.⁴¹⁵

<http://archivedpublicwebsite.up.ac.za/sitefiles/file/47/327/2013%20garnishee%20orders%20follow%20up%20report.pdf>, accessed on 26 September 2017 at 56.

⁴⁰⁹ S Pete... et al *Civil Procedure: A Practical Guide* 2 ed (2011) 347.

⁴¹⁰ "The incidence of and undesirable practices relating to "garnishee orders" – a follow up report" *University of Pretoria* available at <http://archivedpublicwebsite.up.ac.za/sitefiles/file/47/327/2013%20garnishee%20orders%20follow%20up%20report.pdf>, accessed on 26 September 2017 at 56.

⁴¹¹ The first respondent was the Minister of Justice and Correctional Services, who did not oppose the application (para 15). The fourth to eleventh and thirteenth to sixteenth respondents were credit providers, who the applicants entered into credit agreements with (para 16). Flemix was the seventeenth respondent, whose business entailed debt collection services to credit providers (para 17). To represent the interests of the debt collection industry, the Association of Debt Recovery Agents were the eighteenth respondents (para 18).

⁴¹² The South African Human Rights Commission was admitted as *amicus curiae*, as their mandate pertaining to human rights protection fell within this case (para 19).

⁴¹³ Para 10.

⁴¹⁴ Para 11.

⁴¹⁵ Para 13.

The second to sixteenth applicants⁴¹⁶ were clients of the legal aid clinic, they were employed and formed part of individuals on the low end of the wage scale.⁴¹⁷ Desai J examined the loan agreements which the fourth,⁴¹⁸ eighth⁴¹⁹ and fourteenth⁴²⁰ applicants were bound to and concluded that they were victims of reckless lending.⁴²¹ It is submitted that this aspect of the judgement pertaining to reckless lending is crucial to this research and supports the assertion that there is a link between reckless lending and EAOs.

When an EAO is issued against the judgement debtor's salary, it is in effect an attachment of a form of property.⁴²² Moreover, the fact that the applicants in the matter were deemed to be vulnerable as they were low income earners, this attachment had a direct bearing on other rights such as: shelter, health and family life.⁴²³ Desai J was cognisant of the fact that in the case of the applicants, their salaries were important because it assisted them in earning a living, however, when an attachment of it occurred, it deprived them of their right to dignity as enshrined in section 10 of the Constitution.⁴²⁴ Furthermore, a court order or legislation will limit the right to dignity if it reduces an individual's income or creates a hindrance to access social economic rights.⁴²⁵

The applicants' rights to access courts was severely compromised as the credit providers would forum shop for courts,⁴²⁶ which would grant the EAO against the judgement debtors.⁴²⁷ The courts which the credit providers approached were far away from where the applicants resided and worked, thus making it inaccessible.⁴²⁸ Desai J did recognise the fact that it was exceptionally difficult for the applicants to dispute

⁴¹⁶ The applicants sought relief in the form of a declaratory order, whereby sections 65J (2) (a), 65J (2) (b) (1) and 65J (ii) of the MCA be declared unconstitutional for failure to provide for judicial oversight (para 20). Furthermore, the applicants sought an order setting aside the EAOs granted against them, because they were issued in the incorrect jurisdictions and were unlawful and invalid (para 21 and 22).

⁴¹⁷ Para 14.

⁴¹⁸ Para 35.

⁴¹⁹ Para 36.

⁴²⁰ Para 37.

⁴²¹ Para 38.

⁴²² Para 40.

⁴²³ Para 40.

⁴²⁴ Para 41.

⁴²⁵ Para 41.

⁴²⁶ Para 56 and 57: the credit providers were forum shopping for courts to suit themselves, however, in the process this amounted to an infringement of the applicants' rights to access courts.

⁴²⁷ Para 51.

⁴²⁸ Para 51.

or challenge the EAOs, considering the fact that the courts were inaccessible to them.⁴²⁹

In deciding whether judicial oversight would be mandatory to the EAO process, Desai J relied on and interpreted certain key international law instruments. South Africa is not party to the International Labour Organisations' Protection of Wages Convention,⁴³⁰ however, Desai J was of the opinion that by virtue of the fact that many States have ratified it, it has achieved the status of customary law.⁴³¹ This instrument requires that when wages are to be attached, this must be done in a manner whereby the judiciary or another body supervises such attachment.⁴³² Moreover, such attachment must be within the States' laws and must allow for the judgement debtors to be able to provide for themselves and their families.⁴³³ Furthermore, the debtor must be protected and allowed to defend such action when an attachment is made.⁴³⁴

Apart from the above instrument, Desai J relied on two other international law instruments.⁴³⁵ These are not binding, however, were of persuasive value in settling the judicial oversight debacle.⁴³⁶ International law demands that States take precautionary steps to protect its citizens from abuses that they may face from business enterprises. Desai J held that this duty as entailed in international law should be used to interpret the provisions of the MCA.⁴³⁷ Moreover, the system of obtaining EAOs as it was at the time of the High Court judgement failed to comply with the mentioned international law instruments.⁴³⁸

⁴²⁹ Para 53.

⁴³⁰ Article 10:

"1. Wages may be attached or assigned only in a manner and within limits prescribed by national laws or regulations.

2. Wages shall be protected against attachment or assignment to the extent deemed necessary for the maintenance of the worker and his family." This Convention seeks to ensure that workers are not exploited by employers, regarding remuneration. Under the Convention, workers must receive fair and adequate wages and not be subjected to unfair labour practices. International Labour Office Protection of Wages: *Standards and Safeguards Relating to the Payment of Labour Remuneration* (2003) 3.

⁴³¹ Para 67.

⁴³² Para 69.

⁴³³ Para 68.

⁴³⁴ Para 70.

⁴³⁵ Para 71 – 73: the UN Guiding Principles on Business and Human Rights and the Human Rights Council Resolution 26/22 of 15 July 2014.

⁴³⁶ Para 73.

⁴³⁷ Para 74.

⁴³⁸ Para 75.

Apart from the international law obligations, Desai J examined the Constitutional law jurisprudence surrounding judicial oversight such as *Chief Lesapo v The North West Agricultural Bank and Another*, *Jaftha v Schoeman and Others* and *Gundwana v Steko Development CC and Others*.⁴³⁹ These cases were significant to the EAO process as it is a form of execution against the judgement debtor⁴⁴⁰ and all three cases highlight the need for judicial oversight, in execution matters.⁴⁴¹ Moreover, when faced with vulnerable debtors, there is a likelihood that they could fall prey to unscrupulous practices of creditors. Thus, Desai J held that the arguments and reasoning formulated in the above three cases applied to the EAO process.⁴⁴²

In this matter, the respondents tried to argue that as section 65J of the MCA stood at the time of litigation, it was constitutionally valid as the judgement debtor could approach the court to vary or set aside an EAO.⁴⁴³ Desai J rejected this contention as the Constitutional Court jurisprudence indicates that such contention is unacceptable.⁴⁴⁴ Applying the reasoning of *Gundwana*, Desai J held that judicial oversight in the EAO process must be mandatory, it is insufficient that a clerk of court make such a determination.⁴⁴⁵ Furthermore, judicial oversight must be exercised at the time of execution and not at a time when the respondents argued it should be exercised.⁴⁴⁶

4.2.3 Conclusion

Desai J ordered that the EAOs issued against the second to sixteenth respondents were set aside, unlawful and invalid.⁴⁴⁷ It was declared that:⁴⁴⁸

- 1) “The words “the judgment debtor has consented thereto in writing” in section 65J(2)(a) of the Magistrates’ Act 32 of 1944 (“the Magistrates’ Court Act”) and;

⁴³⁹ Para 76. *Chief Lesapo v North West Agricultural Bank and Another* (CCT23/99) [1999] ZACC 16; 2000 (1) SA 409; 1999 (12) BCLR 1420 (16 November 1999). *Jaftha v Schoeman and Others, Van Rooyen v Stoltz and Others* (CCT74/03) [2004] ZACC 25; 2005 (2) SA 140 (CC); 2005 (1) BCLR 78 (CC) (8 October 2004). *Gundwana v Steko Development CC and Others* (CCT 44/10) [2011] ZACC 14; 2011 (3) SA 608 (CC); 2011 (8) BCLR 792 (CC) (11 April 2011).

⁴⁴⁰ Para 80.

⁴⁴¹ Para 77 – 79.

⁴⁴² Para 81.

⁴⁴³ Para 82.

⁴⁴⁴ Para 83.

⁴⁴⁵ Para 84.

⁴⁴⁶ Para 84.

⁴⁴⁷ Para 94.

⁴⁴⁸ Para 94.

2) Section 65J(2)(b)(i) and section 65J(2)(b)(ii) of the Magistrates' Court Act, are inconsistent with the Constitution of the Republic of South Africa Act, 1996 ("the Constitution") and invalid to the extent that they fail to provide for judicial oversight over the issuing of an emolument attachment order against a judgment debtor."⁴⁴⁹

As Desai J made an order of invalidity regarding the above-mentioned sections of the MCA, the judgement as at 8 July 2015 was of no force and effect.⁴⁵⁰ As per section 172 (2) of the Constitution, the decision was of no force and effect in law because it required the Constitutional Court to confirm the High Court's order of invalidity.⁴⁵¹

It is submitted that this judgement is significant as it highlighted the unscrupulous methods which credit providers were engaging in when granting credit and when seeking to recover debt.⁴⁵² Shortly after this judgement, the Department of Justice and Constitutional Development announced that it was in the process of preparing the Magistrates Court Amendment Bill;⁴⁵³ to be discussed below in 4.4.

⁴⁴⁹ After Desai J's judgement was handed down, auditing firm PriceWaterHouse Coopers (PWC) commented on the judgement in light of section 179 (1) of the Tax Administration Act. The comment concerned the fact that section 179 (1) does not allow for judicial oversight as it empowers SARS to issue an EAO against a taxpayer, without approaching the court for authorisation. Considering Desai J's judgement, the comment by the auditing firm was that this provision could be unconstitutional for failure to provide for judicial oversight. It is submitted that due to Desai J's judgement and the subsequent order by the Constitutional Court, this section may face a constitutional challenge for infringing on a taxpayer's section 34 constitutional rights. "Invalidity of Emolument Attachment Orders: comment" (2015) 359 *Tax Breaks Newsletter* 1 – 3.

⁴⁵⁰ M De Jong "University of Stellenbosch Legal Aid Clinic v Minister of Justice and Correctional Services (South African Human Rights Commission as amicus curiae) – Implications for the issuing of emoluments attachment order in maintenance matters?" (2016) 79 (2) *Tydskrif vir hedendaagse Romeins-Hollandse Reg* 266.

⁴⁵¹ M De Jong "University of Stellenbosch Legal Aid Clinic v Minister of Justice and Correctional Services (South African Human Rights Commission as amicus curiae) – Implications for the issuing of emoluments attachment order in maintenance matters?" (2016) 79 (2) *Tydskrif vir hedendaagse Romeins-Hollandse Reg* 266.

⁴⁵² M Thebe "Debt Collection System to be Changed" (2015) *De Rebus* 122.

⁴⁵³ M Thebe "Debt Collection System to be Changed" (2015) *De Rebus* 122.

4.3 *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others; Association of Debt Recovery Agents NPC v University of Stellenbosch Legal Aid Clinic and Others; Mavava Trading 279 (Pty) Ltd and Others v University of Stellenbosch Legal Aid Clinic and Others*⁴⁵⁴

4.3.1 Introduction

The issue before the Constitutional Court, which is of relevance to this paper concerns whether the order of invalidity by Desai J of the MCA should be confirmed.⁴⁵⁵ The purpose of including the Constitutional Court judgement in the paper is primarily to examine its order and its effect, which becomes important in the amendments discussed in 4.4 below.

4.3.2 *The Minority Judgement by Jafta J (Para 1 to 127)*⁴⁵⁶

Jafta J sought to investigate whether the sections contained in the order of invalidity fail to provide for judicial oversight when an EAO is issued; if it fails to provide for judicial oversight, an investigation must be conducted to determine if this limits the rights to access courts as per section 34 of the Constitution.⁴⁵⁷ Jafta J held that the High Court erred in that Desai J failed to interpret section 65J of the MCA, and merely declared section 65J (2) invalid for failure to provide judicial oversight.⁴⁵⁸

In interpreting section 65J of the MCA, it needed to be made clear whether the provision permitted a clerk of court or a court to grant an EAO.⁴⁵⁹ If the provision permits a court and not a clerk, then such provision would not be invalid.⁴⁶⁰ Jafta J relied on two cases⁴⁶¹ where the Constitutional Court held that when determining an

⁴⁵⁴ (CCT127/15) [2016] ZACC 32; 2016 (6) SA 596 (CC); (2016) 37 ILJ 2730 (CC); 2016 (12) BCLR 1535 (CC) (13 September 2016).

⁴⁵⁵ Para 68.

⁴⁵⁶ The purpose of discussing the minority judgement in this aspect of the paper is to provide an overview of the minority's judgement. While the paper does not support the views of the minority, it will be discussed to ensure completeness.

⁴⁵⁷ Para 71.

⁴⁵⁸ Para 72.

⁴⁵⁹ Para 75.

⁴⁶⁰ Para 75.

⁴⁶¹ *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others In re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* (CCT1/00) [2000] ZACC 12; 2000 (10) BCLR 1079 ; 2001 (1) SA 545 (CC) (25 August 2000). *De Beer NO v North-Central Local Council and South-Central Local Council and Others (Umhlathuzana Civic Association Intervening)* (CCT 59/00) [2001] ZACC 9; 2002 (1) SA 429 (CC); 2001 (11) BCLR 1109 (26 September 2001).

issue of constitutional invalidity pertaining to two conflicting approaches, the correct approach to interpretation would be to choose the construction which places the provision within the ambit of the Constitution.⁴⁶²

The text and wording of section 65J indicates that the requirements of section 65J (2) must be complied with for an EAO to be issued.⁴⁶³ The wording of section 65J (1) “a judgement creditor may cause an order to be issued from the court of the district” is relevant for interpretation purposes to determine if it is the court or clerk of court who has the authority to issue the EAO.⁴⁶⁴ Jafta J observed that the section merely refers to the clerk of court once in section 65J (3).⁴⁶⁵

The minority deemed it appropriate to make a declaration in the circumstances, considering the wide spread abuses surrounding EAOs and supposed erroneous interpretation: an EAO may only be issued by a court; as this will protect vulnerable debtors from being left in financial distress.⁴⁶⁶ This must be done after a court has taken into account the factors as per section 65D (4)⁴⁶⁷ of the MCA.⁴⁶⁸ An EAO will be valid if the judgement debtor has sufficient residual income and such order will only apply when the judgement debtor has an excess of funds for their own and their dependants’ upkeep.⁴⁶⁹ Based on the above reasoning, Jafta J held that the High Court’s order of invalidity could not be confirmed as section 65J provided for judicial oversight.⁴⁷⁰

It is submitted that Jafta J has adopted a narrow approach to interpreting section 65J of the MCA. Moreover, while the guidance provided from *Hyundai* and *De Beer* require a court to choose the interpretation which is within the ambit of the Constitution, Jafta J’s interpretation appears to be narrow. In as much as Jafta J commented on the fact that by virtue of the fact that a section may be misconstrued in reality, it does not change its meaning, the minority judgement has effectively ignored the realities and

⁴⁶² Para 76.

⁴⁶³ Para 85.

⁴⁶⁴ Para 86.

⁴⁶⁵ Para 87.

⁴⁶⁶ Para 93.

⁴⁶⁷ Such as: the nature of the debtor’s income, amount necessary for the judgement debtor to support themselves and their dependants.

⁴⁶⁸ Para 90.

⁴⁶⁹ Para 90.

⁴⁷⁰ Para 94.

abuses surrounding section 65J of the MCA. While Jafta J did make a declaration to the effect that only a court may issue an EAO, it is submitted that this was insufficient.

The minority's decision to not confirm the order of invalidity was incorrect and its overall approach flawed. Jafta J did not effectively consider the fact that section 65J (2) (a) by virtue of the "or" implies that a judgement creditor has the option of approaching the court. Furthermore, Jafta J failed to consider that this interpretation does not make judicial oversight mandatory, it makes it optional. The more suitable method would have been for Jafta J to investigate the "or" as it is problematic from an interpretation perspective. The minority chose to justify the argument that section 65J of the MCA allows for judicial oversight by interpreting other sections of the MCA, which have no bearing on EAOs. It thus had the effect of complicating the matter at hand. Moreover, had the minority judgement been adopted by the majority, it would have led to an onerous task for magistrates faced with EAOs.

While criticising Cameron J's approach for not differentiating between execution of movable and immovable property, Jafta J probably lost sight of the fact that both forms of execution have equal ramifications. Moreover, an EAO is a powerful debt collection mechanism and the minority failed to realise that unscrupulous credit providers and other stakeholders wilfully take undue advantage of a wage or salary. Thus, it is submitted that judgement debtors require equal protection in both execution against movable and immovable property.

4.3.3 Cameron J's Majority Judgement (Para 128 to 161)⁴⁷¹

Cameron J agreed with the High Court that the EAO process was flawed for failure to provide for judicial oversight and correctly declared it invalid.⁴⁷² The second judgement is correct unlike the minority, in holding that executions against property form part of the judicial process thus it warrants judicial oversight.⁴⁷³ Cameron J specifically identified and applied the Constitutional Court's jurisprudence on execution, although in the context of immovable property such as *Chief Lesapo*, *Jafta* and *Gundwana*.⁴⁷⁴

⁴⁷¹ Cameron J concurred with the judgement and order of Zondo J, however, elected to write separately (para 128).

⁴⁷² Para 129.

⁴⁷³ Para 129.

⁴⁷⁴ Para 129. These cases dictate that judicial oversight cannot be removed from the execution process. Cameron J's reasoning indicates that it is inextricably linked to the section 34 constitutional right which entrenches the right of access to courts.

Cameron J acknowledged that due to the inherent nature of EAOs, it warrants the need for judicial oversight as it is ultimately a substantive decision.⁴⁷⁵ Through the attachment of the judgement debtor's salary/wage, the court dictates the repayment of the debt.⁴⁷⁶ *Jafta* and *Gundwana* are relevant as the judgement debtor's seek to lose a part of their property in the form of their income, through an EAO.⁴⁷⁷ The absence of judicial oversight in the EAO process infringes a judgement debtor's right to access of courts, as enshrined in section 34 of the Constitution.⁴⁷⁸

Section 65J (2) (a) of the MCA by virtue of the "or" in the provision is indicative of alternatives and that an EAO can be issued if either aspect is triggered.⁴⁷⁹ The "or" allows for a judgement creditor to obtain an EAO either through obtaining the judgement debtor's consent or through court authorisation.⁴⁸⁰ To rebut *Jafta* J's minority judgement, Cameron J counteracted it by attacking the wording of the provision; if a court were at all times empowered with issuing an EAO, the alternative instance in section 65J (2) (a) would seemingly be redundant.⁴⁸¹ Moreover, section 65J (1) indicates that an EAO is issued from the court, not by the court: this appears problematic and Cameron J held that it is indicative of execution without judicial oversight.⁴⁸²

Section 65J (5) states the words "as if it were a court judgement" which Cameron J examined in light of section 65J (2) and concluded that there is no provision for judicial oversight.⁴⁸³ Cameron J acknowledged that while legislation must be interpreted to bring it in line with its true meaning, the Court cannot overstep its boundaries and the separation of powers doctrine by widening the interpretation of a provision.⁴⁸⁴ On a literal interpretation, section 65J (2) excludes judicial oversight.⁴⁸⁵ According to Cameron J, the provision defies the Constitution and in such a situation, the appropriate remedy would be to strike it down as it is offensive.⁴⁸⁶

⁴⁷⁵ Para 130.

⁴⁷⁶ Para 130.

⁴⁷⁷ Para 132.

⁴⁷⁸ Para 133.

⁴⁷⁹ Para 145.

⁴⁸⁰ Para 145.

⁴⁸¹ Para 145.

⁴⁸² Para 145.

⁴⁸³ Para 146.

⁴⁸⁴ Para 147.

⁴⁸⁵ Para 148.

⁴⁸⁶ Para 149.

Cameron J held that the High Court interpreted section 65J correctly as section 65J (1) is dependent on the circumstances in section 65J (2).⁴⁸⁷ Both instances in section 65J (2) are constitutionally invalid as judicial oversight is not mandatory, thus section 65J (1) would be inoperative as it is subjected to section 65J (2).⁴⁸⁸ Moreover, as section 36 of the Constitution allows for a justifiable limitation of a right enshrined in the Bill of Rights, Cameron J held that there is no justified basis upon which the section 34 right can be limited.⁴⁸⁹ Based on this, Cameron J confirmed the substance of the order which the High Court issued despite the third judgement adopting a different remedy.⁴⁹⁰

It is submitted that Cameron J's judgement adopts a broad approach to the issue of judicial oversight.⁴⁹¹ Unlike the first judgement, which criticized this one for not making a distinction between execution of movable and immovable property, Cameron J was correct in applying the principles from *Chief Lesapo, Jaftha and Gundwana* and amplifying its effect to apply to cases of EAOs. It is praiseworthy that Cameron J developed the law on executions from the broad range of constitutional jurisprudence to include EAOs. This all-encompassing approach is welcomed as it will seek to now protect vulnerable judgement debtors, who find themselves helpless and victims of excessive and unlawful EAOs.

Cameron J investigated and interpreted section 65J (2) of the MCA and correctly identified the "or" as providing alternatives to a judgment creditor, which is an aspect of the MCA that has allowed for abuse by virtue of its wording. It is submitted that for execution against any property, judicial oversight must be mandatory. The second judgement has resulted in a triumph for judgement debtors to fully realise and exercise their section 34 constitutional rights. After examining Cameron J's judgement, it appears as if the minority lost sight of the fact, through erroneous interpretation that section 65J of the MCA does not make judicial oversight mandatory and instead infringes on a judgement debtor's ability to approach a court.

⁴⁸⁷ Para 153.

⁴⁸⁸ Para 153.

⁴⁸⁹ Para 153.

⁴⁹⁰ Para 155.

⁴⁹¹ R Brits "The National Credit Act and the Bill of Rights: Towards a constitutional view of consumer credit regulation" (2017) 3 *Journal of South African Law* 476.

In light of the fact that South Africa entered into a constitutional dispensation following the conclusion of Apartheid, legislation ought to be on par with the Constitution. The MCA is a piece of legislation which has been in existence before the constitutional era, thus it remains important for judges to ensure legislation is compliant with the Constitution. Cameron J provided a favourable interpretation of the constitutional rights such as: right of access to courts, right to dignity coupled with socio-economic rights and the right to property to substantiate the need for judicial oversight in the EAO process.

4.3.4 Zondo J's Majority Judgement (Para 162 to 213)

Zondo J concurred with Cameron J's judgement, however, wrote separately to provide another perspective on the issues at hand.⁴⁹² This aspect of the judgment is important to illustrate the order and its effect on EAOs.

Upon interpreting section 65J (1) (a), Zondo J held that while it seems convenient to interpret it to mean a court is empowered to issue EAOs, this is not the case.⁴⁹³ The words "a judgement creditor may cause an emoluments attachment order to be issued from the court" essentially means that it is the judgement creditor, in their capacity as litigant who instructs the court to make or grant an EAO; Zondo J held that this is inconsistent with the Constitution.⁴⁹⁴

Zondo J rejected the contention that it is the court which issues an EAO⁴⁹⁵ as this ignores the role that a court plays in the EAO process.⁴⁹⁶ In light of the MCA, the court's role is to authorise the issuing of an EAO and another official is thus empowered to actually issue it.⁴⁹⁷ In the event that a court does not authorise the issuing of an EAO, it will have no role to play in the issuing.⁴⁹⁸ Zondo J found it necessary to consider the meaning of "issued" in the context of section 65J (1) (a) to determine if this is an administrative or judicial function.⁴⁹⁹ Thus, Zondo J held that "issue" in section 65J (1) (a) is the equivalent to "the plaintiff may cause a summons

⁴⁹² Para 162.

⁴⁹³ Para 172.

⁴⁹⁴ Para 172.

⁴⁹⁵ Para 176.

⁴⁹⁶ Para 177.

⁴⁹⁷ Para 177.

⁴⁹⁸ Para 177.

⁴⁹⁹ Para 178.

to be issued.”⁵⁰⁰ In this instance, there is no inclusion or involvement of a judicial officer like a magistrate.⁵⁰¹ Moreover, section 65J (3) which outlines the steps to obtain an EAO does not make provision for judicial oversight.⁵⁰²

When examining section 65J (2), Zondo J like Cameron J correctly concluded that under paragraph (a), the consent or court authorisation aspects are alternatives.⁵⁰³ Section 65J (2) (a) thus means that an EAO can be issued if the judgement debtor either consents in writing or the court authorises it.⁵⁰⁴ A problem with the first alternative is that if a judgement debtor consents, there is no judicial oversight unlike the second alternative.⁵⁰⁵ Based on this alternative scenario, Zondo J held that the contention that this provision allows for judicial oversight cannot be sustained as it also allows for an alternative, whereby judicial oversight is not required.⁵⁰⁶

Zondo J also identified section 65J (2) (b) (i)⁵⁰⁷ as having some sort of problematic wording.⁵⁰⁸ By virtue of this wording, it is interpreted to mean that the judgement creditor has the power to elect whether the EAO is to be issued or not.⁵⁰⁹ Furthermore, Zondo J indicated that this provision does not sustain the contention that a court issues an EAO; this is due to the fact that it gives a judgement debtor a warning that the EAO “will” be issued and does not utilise the word “may.”⁵¹⁰

Considering what has been discussed above, Zondo J held that section 65J of the MCA was inconsistent with section 34 of the Constitution and thus constitutionally invalid.⁵¹¹ To remedy the section, Zondo J opted to utilise the interpretative mechanisms of reading in⁵¹² and severance.⁵¹³

⁵⁰⁰ Para 184.

⁵⁰¹ Para 184.

⁵⁰² Para 185.

⁵⁰³ Para 194.

⁵⁰⁴ Para 194.

⁵⁰⁵ Para 195.

⁵⁰⁶ Para 196.

⁵⁰⁷ “An emoluments order will be issued if the said amount is not paid within ten days of the date on which the registered letter was posted.”

⁵⁰⁸ Para 197.

⁵⁰⁹ Para 198.

⁵¹⁰ Para 197.

⁵¹¹ Para 203.

⁵¹² Para 206.

⁵¹³ Para 209.

Zondo J used the joint interpretative mechanism of reading in and severance as the former would remedy a constitutional defect by virtue of a legislative omission.⁵¹⁴ To put this into practical application, Zondo J remedied section 65J (2) (a) by severing the “or” and in its place reading in “and.”⁵¹⁵ This would ensure that judicial oversight is mandatory, even if a judgement debtor has consented in writing.⁵¹⁶ Zondo J ordered the reading in of the words “after satisfying itself that it is just and equitable that an emoluments attachment order be issued and that the amount is appropriate” after “authorised” in section 65J (2) (a).⁵¹⁷ This was important to Zondo J because it would ensure that a court considers whether the EAO is just and equitable in the circumstances and such amount is appropriate, before an EAO is issued.⁵¹⁸

Section 65J (2) (b) also required a remedy. Zondo J severed the word “will” in section 65J (2) (b) (i) and ordered the reading in of the word “may” to replace it.⁵¹⁹ This was to ensure that the issuing of an EAO will not be mandatory and is dependent on the court’s discretion.⁵²⁰ The full stop was severed at the end of section 65J (2) (b) (ii) and Zondo J ordered the reading in of a colon and the word “and.”⁵²¹ Furthermore, Zondo

⁵¹⁴ Para 206.

⁵¹⁵ Para 209.

⁵¹⁶ Para 209.

⁵¹⁷ Para 209.

⁵¹⁸ Para 209.

⁵¹⁹ Para 210.

⁵²⁰ Para 210.

⁵²¹ Para 210.

J ordered the reading in of a new section being section 65J (2) (b) (iii).⁵²² Zondo J concurred with Cameron J's reasoning that the order⁵²³ be prospective in nature.⁵²⁴

The third judgement effectively pointed out discrepancies in the MCA, which contradicted the contention that an EAO is a court order. Moreover, Zondo J demonstrated the redundancy of the other subsection in section 65J which rebutted the argument that the provision does allow for judicial oversight.

It is interesting to note the manner in which Zondo J interpreted and resolved the issue of who is empowered to issue the EAO. Moreover, Zondo J correctly interpreted it in light of practical realities whereby a clerk of court is given significant power in the EAO process. The fact that section 65J (2) (a) by virtue of the "or" gave judgement creditors carte blanche to determine which alternative to adopt, gave rise to many abuses and the subsequent argument that judicial oversight is non-existent and not mandatory.

⁵²² "been granted an order of court authorising than an emoluments attachment order be issued after satisfying itself that it is just and equitable that the order be issued and that the amount is appropriate" in para 210.

⁵²³ Para 212: **"65J. Emoluments attachment orders**

. . .

(2) An emoluments attachment order shall not be issued—

(a) unless the judgment debtor has consented thereto in writing ~~or~~ and the court has so authorised after satisfying itself that it is just and equitable that an emoluments attachment order be issued and that the amount is appropriate, whether on application to the court or otherwise, and such authorisation has not been suspended; or

(b) unless the judgment creditor or his or her attorney has first—

(i) sent a registered letter to the judgment debtor at his or her last known address advising him or her of the amount of the judgment debt and costs as yet unpaid and warning him or her that an emoluments attachment order ~~will~~ may be issued if the said amount is not paid within ten days of the date on which that registered letter was posted; and

(ii) filed with the clerk of the court an affidavit or an affirmation by the judgment creditor or a certificate by his or her attorney setting forth the amount of the judgment debt at the date of the order laying down the specific instalments, the costs, if any, which have accumulated since that date, the payments received since that date and the balance owing and declaring that the provisions of subparagraph (i) have been complied with on the date specified therein; and

(iii) been granted an order of court authorising that an emoluments attachment order be issued after satisfying itself that it is just and equitable that the order be issued and that the amount is appropriate."

⁵²⁴ Para 211.

Through the joint interpretative mechanism, the law has now been remedied, to allow for judicial oversight and to ensure that judgement debtors can now fully realise their section 34 constitutional rights.⁵²⁵

4.3.5 Effect of the Order

The effect of the Constitutional Court's order is that a court must authorise the issuing of an EAO, even if the judgement debtor has consented in writing.⁵²⁶ It is no longer permissible for an EAO to be issued without the authorisation of the court.⁵²⁷ Furthermore, the court must be satisfied that it is just and equitable in the circumstances and that such amount to be attached is appropriate.

The severance of "will" and reading in of "may" appears to relax section 65J (2) (b) (i) as an EAO will be issued at the discretion of the court. The inclusion of section 65J (2) (b) (iii) as a mandatory provision to be read into the MCA is significant as it is clear that court authorisation must also be sought under section 65J (2) (b). As the order is prospective, it applies to EAOs from 13 September 2016.

Following the handing down of the Constitutional Court's order, Lisa Steyn from the Mail and Guardian interviewed a Sheriff, whose name and jurisdiction was withheld due to permission not being granted by the Board of Sheriffs.⁵²⁸ The sheriff in question revealed that the applications for EAOs had reduced drastically, as much as by 70% due to the fact that judicial oversight was mandatory.⁵²⁹ As this is only one case study

⁵²⁵ As Zondo J utilised two interpretive mechanism to remedy the constitutional defects, both must be commented upon. Reading in is utilised to remedy a statutory defect, to keep the provision intact in a manner which is compliant with the Constitution. With this statutory mechanism, words are read into the provision to bring it in line with the Constitution and it does give the provision a new meaning. On the other hand, severance is an interpretation mechanism utilised by the court to sever the aspects of the provision which are unconstitutional. Since the court utilised the mechanism of reading in, the effect of the order by Zondo J must be read into the MCA to give effect to the order. A Singh *The Impact of the Constitution on Transforming the Process of Statutory Interpretation in South Africa* (LLD thesis, University of KwaZulu Natal, 2014) 81 – 82.

⁵²⁶ DE van Loggerenberg *Jones and Buckle: Civil Practice of the Magistrates' Courts in South Africa* 10 ed (2017) 444.

⁵²⁷ DE van Loggerenberg *Jones and Buckle: Civil Practice of the Magistrates' Courts in South Africa* 10 ed (2017) 444.

⁵²⁸ "High noon as sheriffs do the dirty debtor work" *Mail and Guardian* 3 November 2016 available at <https://mg.co.za/article/2016-11-03-00-high-noon-as-sheriffs-do-the-dirty-debtor-work>, accessed on 7 October 2017.

⁵²⁹ "High noon as sheriffs do the dirty debtor work" *Mail and Guardian* 3 November 2016 available at <https://mg.co.za/article/2016-11-03-00-high-noon-as-sheriffs-do-the-dirty-debtor-work>, accessed on 7 October 2017.

referred to and one particular jurisdiction, it is submitted that it appears as if the judgment and order, which was prospective in application has seemingly been adhered to.⁵³⁰ There is not enough evidence or statistics to suggest that this is definitely the case, however, anecdotal reports suggests that the order by the Constitutional Court is working. It is submitted that this is due to the fact that a court is required to authorise the issuing of an EAO, to critically evaluate the order itself and the amount sought to be attached.

4.3.6 Conclusion

The judgement handed down by the Constitutional Court and its order is important for the purposes of the subsequent amendment to the law surrounding EAOs. The order and its effect which renders judicial oversight mandatory must be welcomed, as it is a mechanism which can remedy the abuses attached to EAOs.

4.4 Amendments to the Magistrates Court Act

4.4.1 Introduction

Following the order from the Constitutional Court, the MCA was amended by the Courts of Law Amendment Act 7 of 2017 (hereafter referred to as the CLA).⁵³¹ The date of commencement is yet to be fixed by proclamation in the gazette.⁵³² The CLA, in terms of EAOs, seeks to further regulate the manner in which EAOs are issued.⁵³³

The purpose behind the amendment of the MCA, regarding EAOs was to provide relief to debtors who found themselves being victimised by unscrupulous credit providers

⁵³⁰ This can be substantiated by the fact that in the case study referred to by the Mail and Guardian, the sheriff revealed that there has been a drastic reduction in the number of EAOs presented before him.

⁵³¹ GN 769 of GG 41017, 2/8/2016; 21. As per the government gazette, the President assented to the CLA on 31 July 2017 and published it on 2 August 2017.

⁵³² Section 16(1) of the CLA.

⁵³³ To amend the Magistrates' Courts Act, 1944, so as to insert definitions; to regulate the rescission of judgments where the judgment debt has been paid; to further regulate jurisdiction by consent of parties; to regulate the factors a court must take into consideration to make a just and equitable order; to further regulate the payment of debts in instalments or otherwise; to further regulate consent to judgments and orders for the payment of judgment debts in instalments; to further regulate offers by judgment debtors after judgment; to further regulate the issuing of emoluments attachment orders; to further regulate debt collection proceedings pursuant to judgments granted by a court for a regional division; to further regulate the suspension of execution of a debt; to further regulate the abandonment of judgments; and to provide for certain offences and penalties relating to judgments, emoluments attachment orders and instalment orders; to amend the Superior Courts Act, 2013, so as to provide for the rescission of judgments by consent and the rescission of judgments where the judgment debt has been paid; and to provide for matters connected therewith.

and to help debtors who found themselves over-indebted.⁵³⁴ The amendments to the MCA for EAOs seeks to address the provisions of the MCA which plague the system with irregularities and abuses.⁵³⁵ The Parliamentary Portfolio Committee tasked with the amendments to the MCA acknowledged the effect of the order made by the Constitutional Court in the *Stellenbosch Law Clinic* case.⁵³⁶ Moreover, the amendment of the MCA sought to give effect to the Constitutional Court order and to insert the required wording to give the order effect.⁵³⁷

4.4.2 Amendments to the Law

The significant aspect of the amendment pertaining to EAOs and section 65J of the MCA is the fact that judicial oversight is mandatory and there is now a statutory cap of a maximum of 25% which can be deducted from the judgement debtor's basic salary. Furthermore, section 65J (2) (a) has been amended and section 65J (2) (b) (i) and (ii) removed in its entirety. This is indicative of a new process which would have to occur for an EAO to be authorised by the court and subsequently issued.

An insertion by virtue of the CLA to section 65J (1) is that where there is more than one EAO against the judgement debtor's salary, an application for another one may not exceed 25% of the judgement debtor's basic salary.⁵³⁸ When a court is faced with a matter regarding the authorisation of an EAO⁵³⁹ or any other order in the section,⁵⁴⁰ the court must postpone the consideration of the authorisation and set the matter down for hearing.⁵⁴¹

⁵³⁴ "Portfolio Committee Amendments to the Courts of Law Amendment Bill" *Parliament of the Republic of South Africa* 12 June 2017 available at <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/170614amendments.pdf>, accessed on 6 December 2017 at 1.

⁵³⁵ "Portfolio Committee Amendments to the Courts of Law Amendment Bill" *Parliament of the Republic of South Africa* 12 June 2017 available at <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/170614amendments.pdf>, accessed on 6 December 2017 at 1.

⁵³⁶ "Portfolio Committee Amendments to the Courts of Law Amendment Bill" *Parliament of the Republic of South Africa* 12 June 2017 available at <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/170614amendments.pdf>, accessed on 6 December 2017 at 2.

⁵³⁷ "Portfolio Committee Amendments to the Courts of Law Amendment Bill" *Parliament of the Republic of South Africa* 12 June 2017 available at <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/170614amendments.pdf>, accessed on 6 December 2017 at 2.

⁵³⁸ Section 65J (1A) (a). Basic salary is defined in section 65J (1A) (b) as the annual gross salary a judgement debtor is employed on divided by 12 and excludes additional remuneration for overtime or other allowances.

⁵³⁹ Section 65J (1A) (c) (i) (aa).

⁵⁴⁰ Section 65J (1A) (c) (i) (bb).

⁵⁴¹ As per section 65J (1A) (c) (i) (bb), the following must be done first: consider all submission before the court, call for and consider all further available documents and the court must be satisfied that other EAOs exist against the judgement debtor.

Thereafter, the party applying for the authorisation of the EAO or other order: notice of the date of hearing must be served on creditors, their attorneys and the judgement debtor (if he/she was not present or represented at the time consideration of authorisation for the EAO or other order was postponed).⁵⁴² After the hearing and representations, the court can make an order regarding the amount which can be attached, after being satisfied that it is just and equitable and the sum of the total amount of the EAO is appropriate and does not exceed 25% of the judgement debtor's basic salary.⁵⁴³

Section 65J (2) (a) now provides that an EAO may only be issued if the court has authorised, after satisfying itself that it is just and equitable that an EAO be issued and that the attached amount is appropriate.⁵⁴⁴ It is submitted that this aspect of the amendment is significant as the MCA dictates that judicial oversight is mandatory. Moreover, it gives effect to the order made by the Constitutional Court, as envisaged by the Parliamentary Portfolio Committee. The judgement debtor and his/her employer must be served with a notice by the judgement creditor or his/her attorney.⁵⁴⁵ This notice must be in line with the form as prescribed in the Rules that the judgement creditor intends on having an EAO issued against the judgement debtor, in line with the authorisation as per section 65J (2).⁵⁴⁶

The notice needs to contain the following information and must inform the judgement debtor and his/her employer:⁵⁴⁷

- The judgement creditor intends having an EAO issued against the judgement debtor in accordance with the authorisation of the court;⁵⁴⁸
- The full amount of the capital debt, interests and costs outstanding; this must be substantiated by a statement of account; and⁵⁴⁹
- An EAO will be sought until the judgment debtor or his/her employer files a notice of intention to oppose it within ten days after service of the notice.⁵⁵⁰

⁵⁴² Section 65J (1A) (c) (ii).

⁵⁴³ Section 65J (1A) (c) (iii).

⁵⁴⁴ Section 65J (2) (a).

⁵⁴⁵ Section 65J (2A).

⁵⁴⁶ Section 65J (2A).

⁵⁴⁷ Section 65J (2B).

⁵⁴⁸ Section 65J (2B) (a).

⁵⁴⁹ Section 65J (2B) (b).

⁵⁵⁰ Section 65J (2B) (c).

If a judgement debtor or his/her employer files a notice of intention to oppose,⁵⁵¹ the grounds for opposing the issuing of an EAO must be specified.⁵⁵² The grounds which may be used to oppose, are not limited to the following:⁵⁵³ amounts claimed are erroneous or not in accordance with the law⁵⁵⁴ or that 25% of the judgement debtor's basic salary is already committed to other EAOs and that he/she will not have sufficient means left for his/her own maintenance or that of his/her dependants.⁵⁵⁵

If the judgment creditor does not accept the reasons contained in a notice of intention to oppose, the judgement creditor or his/her attorney may then set the matter down for court hearing.⁵⁵⁶ In this instance, notice must be given to the judgement debtor and his/her employer.⁵⁵⁷ In the event that the notice of opposition is based on over commitment of the judgement debtor's salary pertaining to existing court orders or agreements with other creditors, then notice must be given to the other judgement creditors or their attorneys.⁵⁵⁸

Upon hearing all parties and satisfying itself that the EAO will be just and equitable, the court may:⁵⁵⁹

- Rescind the EAO or amend it to affect the balance of the emoluments of the judgement debtor over and above the sufficient means necessary for his/her maintenance and that of his/her dependants; or⁵⁶⁰
- Make any order, which includes an order pertaining to the division of the amount available to be committed to all the EAOs. This is after satisfying itself that the

⁵⁵¹ A notice of intention to oppose must be accompanied by the following information (Section 65J (2C) (c)):

- A certificate by the judgement debtor's employer outlining existing court orders against the judgement debtor, this can also include agreements with other creditors for payment of a debt and costs in instalments (Section 65J (2C) (c) (i) (aa)). The certificate must also include amounts required by the judgement debtor for his/her necessary expenses and those of his/her dependants (Section 65J (2C) (c) (i) (bb))
- Contact details of all judgement creditors or their attorneys; and (Section 65J (2C) (c) (ii))
 - Latest salary advice of the judgement debtor (Section 65J (2C) (c) (iii)).

⁵⁵² Section 65J (2C) (a).

⁵⁵³ Section 65J (2C) (b).

⁵⁵⁴ Section 65J (2C) (b) (i).

⁵⁵⁵ Section 65J (2C) (b) (ii).

⁵⁵⁶ Section 65J (2D).

⁵⁵⁷ Section 65J (2D).

⁵⁵⁸ Section 65J (2D).

⁵⁵⁹ Section 65J (2E).

⁵⁶⁰ Section 65J (2E) (a).

amount is appropriate and does not exceed 25% of the judgement debtor's basic salary and an order as to costs.⁵⁶¹

Section 65J (3) (a) has been amended in its wording to now state that an EAO must be prepared and signed by the judgement creditor or his/her attorney. Section 65J (3) now includes a paragraph (b) to provide that the clerk of the court must ensure that the court⁵⁶² has authorised the EAO⁵⁶³ and that the court does in fact have jurisdiction as per section 65J (1) (a), before the EAO is issued.⁵⁶⁴ Furthermore, the clerk of court must sign it and may ask either the judgement creditor or his/her attorney for more information.⁵⁶⁵ The clerk of court can also refer the EAO to the court, in the event that there is any uncertainty.⁵⁶⁶

4.4.3 Commentary on Amendments

It is submitted that the CLA which seeks to amend the MCA has embodied the essence of the Constitutional Court's order in the *Stellenbosch Law Clinic* judgement. This should be hailed as a victory for the rights of judgement debtors as the law now seeks to provide judicial oversight in the execution process against wages/salaries. Moreover, this is in line with the case law which emerged from the Constitutional Court in respect of execution against immovable property such as: *Chief Lesapo*, *Jaftha* and *Gundwana*; this reasoning has correctly been applied to EAOs.

As per the amendments, it appears as if the courts will play far more of an active and extensive role in authorising an EAO. An interesting observation is that the actual issuing of EAOs is a function of the clerk of courts; this is correct and in line with Zondo J's judgement in the *Stellenbosch Law Clinic* judgement. On the other hand, the court itself is tasked with authorising the issuing of an EAO and determining whether it is just and equitable.

Regarding the 25% maximum cap which has now been introduced, it is submitted that the High Court and Constitutional Court in the *Stellenbosch Law Clinic* judgement would have breached the separation of powers doctrine if a statutory cap was proposed. It is submitted that it is the function of the legislature to make such

⁵⁶¹ Section 65J (2E) (b).

⁵⁶² Section 65J (3) (b).

⁵⁶³ Section 65J (3) (b) (i).

⁵⁶⁴ Section 65J (3) (b) (ii).

⁵⁶⁵ Section 65J (3) (b) (ii).

⁵⁶⁶ Section 65J (3) (b) (ii).

determination. The maximum statutory cap of 25% could be excessive to a low-income judgement debtor as it would attach a significant portion of their basic salary. It is submitted that this one size fits all approach may not be suitable to South Africa's socio-economic framework.

The amendment dictates that the EAO must also be just and equitable. It is submitted that with this requirement, a court would have the onerous task of further applying their minds to the application for an EAO, over and above the statutory cap aspect. This would further safeguard a judgement debtor's salary as a court must also consider the maintenance of the judgement debtor and his/her dependants, including expenses. It is submitted that this is a wholesome approach especially when faced with a low-income earner. It could well be a possibility that the legislature imposed a 25% statutory cap to ensure that a judgement debt is settled in a shorter space of time. If, like the Public Finance Management Act,⁵⁶⁷ which caps an EAO for a state employee at 40%,⁵⁶⁸ this was applied to a non-state employee, this would have been far more onerous and prejudicial to a low-income earner.

4.4.4 Foreign Comparative Analysis

To suggest possible amendment to the MCA, a foreign comparative analysis is essential. The analysis is not intended to be a comprehensive overview of foreign law on EAOs, rather it is an overview to facilitate drawing comparisons with South Africa and suggesting appropriate amendment.

In South African law, the MCA has been problematic as it did not impose a maximum statutory cap pertaining to the maximum amount which could be deducted from a judgement debtor's salary.⁵⁶⁹ This has had the effect that unscrupulous credit providers, attorneys and other stakeholders in the EAO process have abused this.⁵⁷⁰ In the absence of a statutory maximum, the result was that judgement debtors were

⁵⁶⁷ Act 1 of 1999.

⁵⁶⁸ Regulation 23.3.6.

⁵⁶⁹ "The incidence of and undesirable practices relating to "garnishee orders" – a follow up report" *University of Pretoria* available at <http://archivedpublicwebsite.up.ac.za/sitefiles/file/47/327/2013%20garnishee%20orders%20follow%20up%20report.pdf>, accessed on 26 September 2017 at 25.

⁵⁷⁰ "The incidence of and undesirable practices relating to "garnishee orders" – a follow up report" *University of Pretoria* available at <http://archivedpublicwebsite.up.ac.za/sitefiles/file/47/327/2013%20garnishee%20orders%20follow%20up%20report.pdf>, accessed on 26 September 2017 at 25.

left with very little or absolutely nothing in terms of their salary, thus compromising their financial situations.⁵⁷¹ Thus, it must be welcomed that the legislature has imposed a statutory maximum cap of 25%. Ideally, this should provide relief to vulnerable judgement debtors and their financial affairs.

To illustrate the statutory maximum cap on a judgement debtor's wage or salary, certain foreign jurisdictions impose a statutory maximum cap. For example, an established jurisdiction such as the United States of America,⁵⁷² in title III of the Consumer Credit Protection Act imposes a 25% statutory maximum which can be attached from a judgement debtor's disposable earnings for that week.⁵⁷³ For the purposes of a statutory maximum, it is submitted that South African law should not adopt a fixed percentage maximum. Rather, South African law ought to create a legal framework whereby a comprehensive calculation based on the judgement debtor's individual circumstances are considered.

4.4.4.1 German Law

The preferable approach is the German Code of Civil Procedure, which prohibits certain types of income from attachment.⁵⁷⁴ A comparison is being drawn with Germany because it is a well-established jurisdiction with progressive laws. While Germany and South Africa are not on par in terms of socio-economic development, such suggestions can be tailored to fit in with South Africa. Furthermore, Germany has one of the largest economies in the world.⁵⁷⁵

German law does not impose a statutory cap percentage, it instead categorises the income which the judgement debtor earns into attachment exempt thresholds.⁵⁷⁶ The

⁵⁷¹ "The incidence of and undesirable practices relating to "garnishee orders" – a follow up report" *University of Pretoria* available at <http://archivedpublicwebsite.up.ac.za/sitefiles/file/47/327/2013%20garnishee%20orders%20follow%20up%20report.pdf>, accessed on 26 September 2017 at 25.

⁵⁷² The United States of America is a developed country and a comparison is drawn to facilitate appropriate amendment to the position surrounding EAOs in South Africa. "Country Classification" *United Nations* available at http://www.un.org/en/development/desa/policy/wesp/wesp_current/2014wesp_country_classification.pdf, accessed on 3 January 2018 at 145.

⁵⁷³ § 1673.

⁵⁷⁴ Section 850a: Such as student allowances, death benefits, allowances for expenses amongst others.

⁵⁷⁵ "Country Classification" *United Nations* available at http://www.un.org/en/development/desa/policy/wesp/wesp_current/2014wesp_country_classification.pdf, accessed on 2 January 2018 at 145.

⁵⁷⁶ Section 850C. Section 850C (2a) allows for the income thresholds to be revised by 1 July of every second year.

amount attached must allow for the judgement creditor to have sufficient income retained to fulfil his/her statutory and maintenance obligations.⁵⁷⁷

In Germany, a judgement debtor's earned income shall be exempted from attachment provided such amount does not exceed 930 euros per month, 217.50 euros per week, or 43.50 euros per day; this is dependent on the period of time for which it is being paid.⁵⁷⁸ If the judgement debtor is under a statutory obligation such as maintenance to a spouse, divorced spouse, relative or to a parent, then the exempted amount increases up to: 2,060 euros per month, 478.50 euros per week, or 96.50 euros per day.⁵⁷⁹

It is submitted that the MCA in South Africa should be amended considering German law. This should be done by firstly, removing the 25% statutory maximum which is to be enforced. The legislature should consider categorising income thresholds into the MCA, which like Germany should be revised every year due to South Africa's socio-economic climate. This revision must be done by the Minister of Justice and Constitutional Development and the Minister of Finance, in consultation with the South African Reserve Bank and other stakeholders. With this amendment, judgement debtors would be in a far more favourable position and better off.

It is submitted that to ensure the amendments to the MCA pertaining to EAOs are carried out and understood properly to allow for proper implementation, magistrates need to be provided with some sort of training.⁵⁸⁰ The Department of Justice and Correctional Service should implement an education programme, together with legal experts and academics. This education programme needs to clarify the current position on EAOs and the manner in which magistrates are expected to apply their minds, when faced with an application for an EAO.

Like German law, the magistrate must do the calculations and in line with the *Stellenbosch Law Clinic* judgement, the magistrate must determine whether an amount is appropriate for attachment. Furthermore, the education programme should

⁵⁷⁷ Section 850d.

⁵⁷⁸ Section 850c (1).

⁵⁷⁹ Section 850c (1).

⁵⁸⁰ "Comments by the Law Society of South Africa (LSSA) On the Working Document: Magistrates' Courts Amendment Bill Relating to Amendments to Sections 36, 57, 58, 65, 65J and 86" *Law Society of South Africa* available at <http://www.lssa.org.za/upload/documents/LSSA%20Comments%20on%20Magistrates%20Courts%20Amendment%20Bill.pdf>, accessed on 9 October 2017 at 9 – 10.

also provide magistrates with mechanisms to determine what is just and equitable. This education programme should also apply to clerks of court as they must issue the EAO; the focus should be on jurisdiction and identifying if the EAO is properly authorised.⁵⁸¹

4.4.4.2 Botswana Law

Compared to Germany and the United States of America which are established jurisdictions, Botswana is a country seemingly on par with South Africa.⁵⁸² Furthermore, both South Africa and Botswana have similar socio-economic and political conditions.⁵⁸³

Regarding the procedure to obtain an EAO, it appears as if the amendments to the MCA are on par with Botswana.⁵⁸⁴ Civil procedure pertaining to EAOs in Botswana requires that the applicant for the EAO makes an *ex parte* application, supported by an affidavit stating that judgement has been obtained.⁵⁸⁵

Moreover, for the purposes of the actual amount which can be attached, the affidavit must contain details stating that the judgement debtor will have sufficient means to maintain himself/herself and any dependants, upon the granting of the EAO.⁵⁸⁶ From a procedural perspective and to ensure the judgement debtor is involved throughout the process, he/she can oppose the confirmation of the EAO, subject to certain grounds.⁵⁸⁷

It has been argued that the commendable aspect about the Botswana EAO system is that it requires a rule nisi to be issued first.⁵⁸⁸ Moreover, drawing from the Botswana

⁵⁸¹ "Comments by the Law Society of South Africa (LSSA) On the Working Document: Magistrates' Courts Amendment Bill Relating to Amendments to Sections 36, 57, 58, 65, 65J and 86" *Law Society of South Africa* available at <http://www.lssa.org.za/upload/documents/LSSA%20Comments%20on%20Magistrates%20Courts%20Amendment%20Bill.pdf>, accessed on 9 October 2017 at 10.

⁵⁸² "Botswana" *South African History Online* available at <http://www.sahistory.org.za/places/botswana>, accessed on 7 December 2017.

⁵⁸³ "Country Classification" *United Nations* available at http://www.un.org/en/development/desa/policy/wesp/wesp_current/2014wesp_country_classification.pdf, accessed on 2 January 2018 at 146.

⁵⁸⁴ Order 36 of the Statutory Instrument No 13 of 2011 of the Rules of the Magistrates Court.

⁵⁸⁵ Order 36 rule 1.

⁵⁸⁶ Order 36 rule 1 (1) (e).

⁵⁸⁷ Order 36 rule 3 (1) (a) – (e).

⁵⁸⁸ A Swana *Emoluments Attachment Orders: In Light of the Widespread Fraudulent and Undesirable Practices in Emoluments Attachment Orders Should this Debt Collection Mechanism Continue to Exist?* (LLM Thesis, University of KwaZulu Natal, 2015) at 82.

civil procedure, its inclusion in South African law would allow for the involvement of the judgement debtor in the proceedings.⁵⁸⁹ An advantageous factor of the rule nisi aspect is that it allows for a judgement debtor to appear before court and contest the EAO.⁵⁹⁰ The amendments to the MCA dictate that a notice must be issued to the judgement debtor before the actual EAO is granted. It is submitted that this new procedural aspect is in line with the Botswana EAO position. Furthermore, it is deemed to be a valuable mechanism in debt collection as it could see a reduction in the abuses prevalent in the EAO system.

Like German law, civil procedure in Botswana does not impose a statutory maximum pertaining to the amount which can be attached from a judgement debtor's wage/salary. The law in Botswana dictates that the court must be satisfied that the judgement debtor will have sufficient income to maintain himself and any dependants.⁵⁹¹ It is submitted that this will be insufficient to South African law due to the various abuses surrounding EAOs. Furthermore, South African law requires a framework like German law regarding the amount which can be attached from a judgement debtor's wage/salary.

4.4.4.3 United Kingdom (England and Wales)

The United Kingdom is a well-developed jurisdiction, with a markedly different socio-economic landscape to South Africa.⁵⁹² Nonetheless, the United Kingdom's legal position on EAOs can serve to facilitate comparisons with South African law.

The Attachment of Earnings Act 1971 utilises a protected earnings rate, to determine the amount which can be attached from a judgement debtor's earnings.⁵⁹³ This must be conducted in a manner which encompasses the judgement debtor's resources and needs. Moreover, the court must be satisfied that such deduction is reasonable.⁵⁹⁴ A

⁵⁸⁹ A Swana *Emoluments Attachment Orders: In Light of the Widespread Fraudulent and Undesirable Practices in Emoluments Attachment Orders Should this Debt Collection Mechanism Continue to Exist?* (LLM Thesis, University of KwaZulu Natal, 2015) at 82.

⁵⁹⁰ A Swana *Emoluments Attachment Orders: In Light of the Widespread Fraudulent and Undesirable Practices in Emoluments Attachment Orders Should this Debt Collection Mechanism Continue to Exist?* (LLM Thesis, University of KwaZulu Natal, 2015) at 82.

⁵⁹¹ Order 36 rule 1 (1) (e).

⁵⁹² "Country Classification" *United Nations* available at http://www.un.org/en/development/desa/policy/wesp/wesp_current/2014wesp_country_classification.pdf, accessed on 3 January 2018 at 145.

⁵⁹³ Section 6 (5) (b).

⁵⁹⁴ Section 6 (5) (b).

county court is empowered to issue an EAO for the payment of a judgement debt, other than a debt of less than five pounds or other such sum as prescribed by county court rules.⁵⁹⁵

The process to determine the attached amount is articulated in Schedule 3 of the Attachment of Earnings Act. The Schedule requires that in the case of a repayment for a judgement debt, an employer deduct the amount of the excess or the normal deduction, whichever is less if the attachable earnings exceed protected earnings.⁵⁹⁶ A deduction is prohibited if the attachable earnings are equal to, or less than the protected earnings.⁵⁹⁷

The United Kingdom expressly prohibits the attachment of certain amounts as it does not constitute earnings,⁵⁹⁸ these include: sums payable by any public department,⁵⁹⁹ pay or allowances received as a member of the Queen's forces,⁶⁰⁰ pension, allowances,⁶⁰¹ disability grants⁶⁰² and wages payable to a person as a seaman.⁶⁰³

The County Court Rules 1981 outlines the process for an attachment of earnings order.⁶⁰⁴ A judgement creditor files an application for an attachment of earnings, with a copy for service on the judgement debtor in the jurisdiction where the judgement debtor resides.⁶⁰⁵ This application must entail a certified copy of the order⁶⁰⁶ and the amount under the order.⁶⁰⁷ Thereafter, once these documents have been filed, the court official will set down a date for hearing the application.⁶⁰⁸ Within eight days after service on the judgement debtor, he/she must file a reply⁶⁰⁹ and upon such receipt of the reply, the court official will then send a copy to the applicant.⁶¹⁰

⁵⁹⁵ Section 1 (2) (b).

⁵⁹⁶ Part 1 of Schedule 3.

⁵⁹⁷ Part 1 of Schedule 3.

⁵⁹⁸ Section 24 (2).

⁵⁹⁹ Section 24 (2) (a).

⁶⁰⁰ Section 24 (2) (b).

⁶⁰¹ Section 24 (2) (c).

⁶⁰² Section 24 (2) (d).

⁶⁰³ Section 24 (2) (e).

⁶⁰⁴ Order 27.

⁶⁰⁵ Order 27, section 4 (1).

⁶⁰⁶ Order 27, section 4 (1) a).

⁶⁰⁷ Order 27, section 4 (1) (b).

⁶⁰⁸ Order 27, section 4 (2).

⁶⁰⁹ Order 27, section 5 (1).

⁶¹⁰ Order 27, section 5 (3).

The commendable aspect about the MCA amendments and the legal position regarding EAOs in the United Kingdom is the mandatory hearing. The amendments to the MCA require that a hearing before a magistrate be conducted before the authorisation of the EAO. It is submitted that regarding the hearing, South African law will be on par with the United Kingdom, once the amendments to the MCA come into operation.

4.4.5 Conclusion

The new procedure to obtain an EAO, as per the MCA amendments are seemingly on par with the above mentioned foreign jurisdictions, in terms of procedure and the involvement of judicial oversight. Like Botswana, a judgement debtor in South Africa will be more involved in the process now. Moreover, the abuses and irregularities which were prevalent in the EAO system by virtue of a lack of judicial oversight are now seemingly remedied. The amendments to the MCA allows for the judgement debtor to oppose the application for an EAO and creates a system of inclusion for all stakeholders to be involved in the process, before the order can be granted. It is submitted that for the MCA amendments to be fully on par with foreign law such as Germany, the 25% percentage maximum ought to be removed and replaced with a more comprehensive approach.

4.5 Conclusion

As alluded to in previous chapters,⁶¹¹ the EAO process was in dire need of judicial oversight due to the abuses prevalent in the process.

This chapter discussed the High Court and Constitutional Court judgements from the *Stellenbosch Law Clinic* judgement. From the High Court and majority judgements in the Constitutional Court, the Judges sought to give effect to the section 34 constitutionally entrenched right. Moreover, the Judges amplified the law on EAOs and applied the reasoning from cases based on immovable property to execution in the form of EAOs. As opposed to adopting an overall approach of notional severance, the law was remedied by the Constitutional Court through the joint interpretive mechanism of reading in and severance.

After the Constitutional Court judgement, the amendments to the MCA were assented to by the President almost a year later. These amendments are yet to come into force, thus, we await a commencement date. The essence of the majority judgements from the Constitutional Court are embodied in the amendments as now the court plays a far more active role in the EAO process. In order for these amendments to become fully operational and attain the legislature's objectives, they need to be understood and applied correctly. Moreover, there needs to be amendment regarding the statutory cap.

Education plays a pivotal role in the debt collection industry, thus magistrates and court clerks who will be tasked with authorisation and subsequent issuing need to ensure that they do understand the process well. From the judgments and amendments discussed above, it is well understood that the judiciary and legislature concurred with the general call for the inclusion of judicial oversight in the EAO process. If applied correctly, judicial oversight will be the solution to improving the law on EAOs as magistrates, by virtue of their legal knowledge are far more capable of making appropriate orders pertaining to EAOs.

⁶¹¹ See chapter 3.

Chapter 5

Conclusion and Recommendations

5.1 Conclusion

This dissertation sought to examine whether a link exists between reckless credit and EAOs. While there are little concrete statistics to prove such link, anecdotal evidence in the form of case law,⁶¹² research reports⁶¹³ and articles⁶¹⁴ illustrates that the link is definitively in existence.

Reckless lending occurs when an unscrupulous credit provider is given documents from a consumer regarding their financial position, he/she either conducts no pre-agreement assessment or ignores the outcome of one, thus engaging in reckless credit practices when credit is granted. This link exists because some credit providers utilise unscrupulous methods to ensure that a consumer defaults on the credit agreement, thus an EAO is a form of security for repayment.

South Africa has an over-indebted society with many consumers who rely on credit to access goods and services. In order to obtain credit, the NCA specifically prohibits the granting of reckless credit, to curtail over-indebtedness. This is in line with the legislature's intention to enhance consumer protection and promote a healthy credit market. To achieve this, a thorough pre-agreement assessment ought to be the foundation to good credit practices. This research sought to prove that if a pre-agreement assessment is flawed, it is almost inevitable that default would occur which in many instances may lead to an EAO.

⁶¹² *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice And Correctional Services and Others* (16703/14) [2015] ZAWCHC 99; 2015 (5) SA 221 (WCC); [2015] 3 All SA 644 (WCC); (2015) 36 ILJ 2558 (WCC) (8 July 2015).

⁶¹³ "The incidence of and the undesirable practices relating to garnishee orders in South Africa" *The National Credit Regulator* available at <https://www.ncr.org.za/documents/pages/research-reports/oct08/GARNISHEE-ORDERS-STUDY-REPORT.pdf>. "The incidence of and undesirable practices relating to "garnishee orders" – a follow up report" *University of Pretoria* available at <http://archivedpublicwebsite.up.ac.za/sitefiles/file/47/327/2013%20garnishee%20orders%20follow%20up%20report.pdf>.

⁶¹⁴ B Whittle "LSSA condemns unscrupulous garnishee practices" (2013) *De Rebus* 13.

To strengthen the argument that the EAO process is flawed, BASA released a joint statement with National Treasury,⁶¹⁵ evidenced by statistics illustrating how flawed the EAO process is and the prevalence of over-indebtedness in consumers. Moreover, BASA advised its members against utilising EAOs, thus acknowledging the unscrupulous methods and irregularities in the EAO system.⁶¹⁶ Furthermore, research conducted by the University of Pretoria revealed the irregularities and unethical practices surrounding EAOs.⁶¹⁷ There appears to be a move to changing debt collection practices pertaining to EAOs, which this dissertation evaluated and proposed amendment for.

The first chapter provided an overview of the dissertation, including its aims and research questions. This chapter created a framework demonstrating the research problem, through statistics obtained from the NCR⁶¹⁸ that South Africans are indeed in a state of over-indebtedness and unable to satisfy their debt obligations. From the perspective of the overall research problem at hand, this was significant as a link could be drawn to financial ignorance.⁶¹⁹ Moreover, unscrupulous credit providers take undue advantage of the fact that consumers are desperate for credit, thus it is provided in a reckless manner, which eventually culminates in an EAO.

The second chapter examined the concept of reckless credit in South African law. It clearly demonstrated that prior to amendment, credit providers were given an unlimited amount of freedom to determine their own evaluative mechanisms and models, when conducting pre-agreement assessments.⁶²⁰ This led to issues and instances of

⁶¹⁵ "Ensuring responsible market conduct for bank lending" *Insurance Times and Investment News* available at <http://views.itinews.co.za/Views/ViewArticle.aspx?Article=7EE1B5F8-9681-4945-80B1-0A1D8C0372C2&CID=21806&Company=National%20Treasury%20-%20Ministry%20of%20Finance#sthash.hKYm8Xzt>, accessed on 5 January 2018.

⁶¹⁶ "Ensuring responsible market conduct for bank lending" *Insurance Times and Investment News* available at <http://views.itinews.co.za/Views/ViewArticle.aspx?Article=7EE1B5F8-9681-4945-80B1-0A1D8C0372C2&CID=21806&Company=National%20Treasury%20-%20Ministry%20of%20Finance#sthash.hKYm8Xzt>, accessed on 5 January 2018.

⁶¹⁷ "The incidence of and the undesirable practices relating to garnishee orders in South Africa" *The National Credit Regulator* available at <https://www.ncr.org.za/documents/pages/research-reports/oct08/GARNISHEE-ORDERS-STUDY-REPORT.pdf>. "The incidence of and undesirable practices relating to "garnishee orders" – a follow up report" *University of Pretoria* available at <http://archivedpublicwebsite.up.ac.za/sitefiles/file/47/327/2013%20garnishee%20orders%20follow%20up%20report.pdf>.

⁶¹⁸ "Annual Report 2015/2016" *The National Credit Regulator* available at <https://www.ncr.org.za/documents/pages/Annual%20Reports/NCR%20Annual%20Report%202015-16.pdf>.

⁶¹⁹ J Campbell "Restoring Rational Choice: The Challenge of Consumer Financial Regulation" (2016) *Sloan Foundation Economic Research Paper* No. 2719330 17.

⁶²⁰ JW Scholtz...et al *Guide to the National Credit Act* (2008) 11.5.

reckless lending as there was no conformity in the credit industry and neither could the quality of these assessments be measured.⁶²¹ Apart from the shortcomings in the NCA, the chapter proposed amendment in the form of the inclusion of external market factors in pre-agreement assessments, in an attempt to enhance the quality of credit provided and curtail reckless lending.⁶²²

The third chapter formed the crux of the argument and aimed to effectively answer the main research problem i.e. whether a link exists between reckless credit and EAOs. The chapter examined certain examples of reckless lending practices to demonstrate how consumers are trapped in a cycle of debt.⁶²³ The most authoritative source was the High Court judgement from the *Stellenbosch Law Clinic* case. The chapter also considered the impact of financial ignorance and importance of educational awareness that credit providers ought to engage in.⁶²⁴ Moreover, the section 129 notice needs to be clearly understood by consumers. Prior to the *Stellenbosch Law Clinic* case, the research reports by the University of Pretoria⁶²⁵ highlighted various abuses prevalent in the EAO process. From this, the call for judicial oversight became strong.

The fourth chapter critically analysed the High Court⁶²⁶ and Constitutional Court⁶²⁷ judgements from the *Stellenbosch Law Clinic* case, to ascertain whether judicial oversight is required to improve the law on EAOs. The focal points of both judgements were the arguments and binding points about judicial oversight. In determining the

⁶²¹ JW Scholtz...et al *Guide to the National Credit Act* (2008) 11.5.

⁶²² S De Wet... et al "Measuring the effect of the national credit act on indebtedness in South Africa" (2015) 8 (1) *Journal of Economic and Financial Sciences*.

⁶²³ *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others* (16703/14) [2015] ZAWCHC 99; 2015 (5) SA 221 (WCC); [2015] 3 All SA 644 (WCC); (2015) 36 ILJ 2558 (WCC) (8 July 2015).

⁶²⁴ J Campbell "Restoring Rational Choice: The Challenge of Consumer Financial Regulation" (2016) *Sloan Foundation Economic Research Paper* No. 2719330 17.

⁶²⁵ "The incidence of and the undesirable practices relating to garnishee orders in South Africa" *The National Credit Regulator* available at <https://www.ncr.org.za/documents/pages/research-reports/oct08/GARNISHEE-ORDERS-STUDY-REPORT.pdf>. "The incidence of and undesirable practices relating to "garnishee orders" – a follow up report" *University of Pretoria* available at <http://archivedpublicwebsite.up.ac.za/sitefiles/file/47/327/2013%20garnishee%20orders%20follow%20up%20report.pdf>.

⁶²⁶ *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others* (16703/14) [2015] ZAWCHC 99; 2015 (5) SA 221 (WCC); [2015] 3 All SA 644 (WCC); (2015) 36 ILJ 2558 (WCC) (8 July 2015).

⁶²⁷ *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others; Association of Debt Recovery Agents NPC v University of Stellenbosch Legal Aid Clinic and Others; Mavava Trading 279 (Pty) Ltd and Others v University of Stellenbosch Legal Aid Clinic and Others* (CCT127/15) [2016] ZACC 32; 2016 (6) SA 596 (CC); (2016) 37 ILJ 2730 (CC); 2016 (12) BCLR 1535 (CC) (13 September 2016).

current regulation of EAOs, chapter four analysed the amendments to the MCA which makes judicial oversight mandatory and imposes a statutory maximum of 25% which can be deducted from a judgement debtor's wage/salary.⁶²⁸ The chapter undertook a foreign comparative analysis with Germany,⁶²⁹ to propose a potential amendment to the law of EAOs, as the 25% statutory cap may be inappropriate for South Africa. A foreign comparative analysis was also conducted with Botswana and the United Kingdom (England and Wales) to determine whether the amendments to the MCA are on par with foreign law. From the discussion in chapter four, it was evident that judicial oversight is the solution to improving the law on EAOs.

5.2 Recommendations

Considering the above, this research makes the following recommendations.

5.2.1 The Inclusion of External Market Factors In the NCA

Chapter two⁶³⁰ criticised the NCA for a failure to include external market factors into a pre-agreement assessment.⁶³¹ The chapter emphasised the importance of this inclusion as South Africa has a volatile economy combined with predatory lending practices.

In order to address this perceived shortcoming, which it is submitted will strengthen the quality of pre-agreement assessments, it is recommended that:

5.2.1.1) Credit providers must conduct a stress test of a consumer to determine the sensitivity of a consumer to external market factors.⁶³²

5.2.1.2) In order to implement this, the legislature must make provision for the inclusion of external market factors in pre-agreement assessments. In doing this, the industry which the consumer is employed in must be a vital consideration and how volatile a particular industry is.

⁶²⁸ Courts of Law Amendment Act 7 of 2017.

⁶²⁹ German Code of Civil Procedure.

⁶³⁰ See 2.4.

⁶³¹ S De Wet... et al "Measuring the effect of the national credit act on indebtedness in South Africa" (2015) 8 (1) *Journal of Economic and Financial Sciences*.

⁶³² S De Wet... et al "Measuring the effect of the national credit act on indebtedness in South Africa" (2015) 8 (1) *Journal of Economic and Financial Sciences* 100.

5.2.1.3) Furthermore, the happenings of the industry must also be considered. Chapter two⁶³³ provided an example of a miner and the consideration of protest action which must be taken into account.

5.2.1.4) When considering which factors are relevant in an affordability assessment, government must consult together with the relevant stakeholders such as the NCR, credit providers, actuaries, consumer protection experts, lawyers and economists.

5.2.1.5) It is recommended that these factors and a mandatory stress test form part of the affordability assessment guidelines.

5.2.1.6) When a credit provider conducts a stress test to determine the extent of the consumer's sensitivity to external market factors, it is recommended that provision is made for an appropriate percentage buffer.

5.2.1.7) It is submitted that over and above the buffer which makes provision for living expenses and to reduce over-indebtedness, further provision must also be made for an external economic factor such as recession or unemployment amongst others.

5.2.2 Further Education and Awareness for Consumers

Chapter three⁶³⁴ identified how fatal financial ignorance can be when consumers conclude agreements.⁶³⁵

For consumers to be educated about their financial decisions, credit providers such as banks and other stakeholders must embark upon education programmes. Such programmes need to educate consumers about key financial terms and concepts like interest, reckless credit and which administrative body can be approached for dispute resolution. It is submitted that this must also include education about legal concepts, the legal consequences of reckless lending and default. Moreover, this must be available in plain and understandable language and if possible, translated into a language which the consumer understands. Ideally, over and above financial

⁶³³ See 2.4.

⁶³⁴ See 3.2.

⁶³⁵ J Campbell "Restoring Rational Choice: The Challenge of Consumer Financial Regulation" (2016) *Sloan Foundation Economic Research Paper* No. 2719330 17.

institutions embarking upon education programmes, schools must build financial education into their curriculums as it is an essential life skill.

Chapter three⁶³⁶ made recommendations in line with the First National Bank – Be Financially Smart program. It is recommended that credit providers like banks and other stake holders create programs like this, with a focal point of educating consumers to enable them to make wise financial decisions. This will assist them in identifying certain red flags and making appropriate decisions.

5.2.3 Further Training for Magistrates and Court Clerks

Since there has been considerable amendment to the MCA ⁶³⁷and judicial officers like magistrates are now required to play a far more active role, further training needs to be provided.

It is recommended that the Department of Justice and Correctional Service should implement an education programme, together with legal experts and academics. This education programme needs to clarify the current position on EAOs and the manner in which magistrates are expected to apply their minds, when faced with an application for an EAO. In light of the just and equitable requirements as per the amendments, the education program needs to include mechanisms to assist magistrates to effectively apply their minds.

Furthermore, this must also be extended to include court clerks as the new amendments to the MCA require that they actually issue the EAO. Moreover, court clerks must also ensure that the jurisdiction requirements are correctly applied. As the University of Pretoria identified court clerks as not having sufficient knowledge about the EAO process, this education program is also vital as skills development.

This further education will also be required, as the proposed recommendation below requires a significant calculation to be conducted by a magistrate when determining the portion of a salary which can be attached. As this will involve a thorough mathematical calculation, magistrates must be trained and given proper guidelines to conduct these calculations. Moreover, this education programme needs to equip magistrates to apply their minds to determine a just and equitable outcome.

⁶³⁶ See 3.2.

⁶³⁷ See 4.4.

5.2.4 Amendment to the MCA Regarding the 25% Statutory Cap – Adopting the German Law Approach

Chapter four⁶³⁸ recommended that the 25% statutory maximum cap be removed as it is unsuitable to South Africa. Moreover, this one size fits all approach adopted by the legislature could be detrimental to low income consumers.

The recommendation is that the MCA in South Africa be amended in light of German law. This should be done by firstly, removing the 25% statutory maximum which can be attached from a judgement debtor's salary/wage. In adopting the German approach to the MCA, certain income such as: social grants, student allowances, bonuses which should be capped at a certain amount which can be deducted and expenses for employment should be prohibited from attachment.⁶³⁹

The German Code of Civil Procedure allows for certain income to be attached, under certain conditions such as: earnings from third parties and pension to be paid for an injury amongst others.⁶⁴⁰ It is submitted that owing to the socio-economic climate of South Africa, this should not be adopted into South African law as it may defeat the just and equitable requirement and compromise consumers' financial affairs.

The legislature should consider categorising income thresholds into the MCA, like German law. In order to implement this, the financial affairs of the low income earners should be given preference when categorising income and as such, this group should not be subjected to unreasonable thresholds. To categorise the income thresholds, government must appoint a commission consisting of financial and wealth experts. The commission ought to gather socio-economic statistics to determine how income ought to be categorised.

It is submitted that this should be revised every year due to South Africa's socio-economic climate. Moreover, this revision must be done by the Minister of Justice and Constitutional Development and the Minister of Finance, in consultation with the South African Reserve Bank and other stakeholders. In accordance with transparency and with an aim to reduce debt levels in South Africa, the Minister of Finance and Minister

⁶³⁸ See 4.4.

⁶³⁹ Section 850a of the Code of Civil Procedure.

⁶⁴⁰ Section 850b of the Code of Civil Procedure.

of Justice and Constitutional Development should address the relevant parliamentary committees on this process regularly.

When a matter of attachment is before a Magistrate, a calculation must be done whereby the income thresholds are taken into account, necessary expenses and statutory obligations deducted, along with any other amounts necessary for the upkeep and maintenance of the judgment debtor must be considered. Thereafter, considering the amount left over, the Magistrate should make a just and equitable determination regarding the amount which can be attached from a judgement debtor's salary. It is submitted that a Magistrate should also investigate the fairness of the overall judgement debt and remove any unlawful costs.

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30 June 2017

Ms Nishtha Singh (213517347)
School of Law
Howard College Campus

Dear Ms Singh,

Protocol reference number: HSS/0952/017M

Project title: The link between reckless credit and Emolument Attachment Order

Approval Notification – No Risk / Exempt Application

In response to your application received on 27 June 2017, the Humanities & Social Sciences Research Ethics Committee has considered the abovementioned application and the protocol has been granted **FULL APPROVAL**.


Any alteration/s to the approved research protocol i.e. Questionnaire/Interview Schedule, Informed Consent Form, Title of the Project, Location of the Study, Research Approach and Methods must be reviewed and approved through the amendment/modification prior to its implementation. In case you have further queries, please quote the above reference number.

PLEASE NOTE: Research data should be securely stored in the discipline/department for a period of 5 years.

The ethical clearance certificate is only valid for a period of 3 years from the date of issue. Thereafter Recertification must be applied for on an annual basis.

I take this opportunity of wishing you everything of the best with your study.

Yours faithfully



Dr Shamila Naidoo (Deputy Chair)

/ms

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Cc Academic Leader Research: Dr Shannon Bosch
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